84-447

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ALEXANDER L. STEVAS,
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

METROPOLITAN PROPERTY & LIABILITY INSURANCE COMPANY,
Petitioner

v.

EARL M. LONGENECKER; MARY JANE LONGENECKER; WILLIAM E. BAKER; STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and AMERICAN MOTORISTS INSURANCE COMPANY,
Respondents

PETITION FOR WRIT OF CERTIORARI

To The United States Court of Appeals
For the Third Circuit

Stanley P. Stahl
Allan C. Molotsky
POST & SCHELL, P.C.
210 West Washington Square
12th Floor
Philadelphia, PA 19106
(215) 925-6340
Attorneys for Petitioner

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

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QUESTIONS PRESENTED

1. Did the Court of Appeals erroneously apply the abuse of discretion standard in reviewing the District Court's finding that there was no case or controversy?

2. Assuming, arguendo, that the abuse of discretion standard is the appropriate standard of review, did the Appellate Court properly apply this standard?

3. Is there a sufficient ripe controversy between Petitioner uninsured motorist insurance carrier and Respondent liability insurance carriers to determine various coverage questions where it is a practical certainty that Petitioner uninsured motorist carrier will have to pay money to its insured?

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OPINIONS BELOW

The Order and Opinion of the Court of Appeals affirming the District Court's dismissal of the Petition for Declaratory Judgment of Metropolitan Property & Liabil-

ity Insurance Company (App. A-13 et seq.) is not reported. The Order and Opinion of the United States District Court dismissing the Petition for Declaratory Judgment (App. A-8 et seq.) is not reported.

JURISDICTION

This Petition for a Writ of Certiorari is filed within ninety (90) days after the affirmance by the Court of Appeals on June 18, 1984 of the District Court's dismissal of the Petition for Declaratory Judgment by Metropolitan Property & Liability Insurance Company. The jurisdiction of the Court is invoked under 28 U.S.C. §1254 (1).

STATUTES INVOLVED

Section 2201 of Title 28, United States Code provides:

> "In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 [26 USCS §7428] or a proceeding under section 505 or 1146 of title 11 [11 USCS §505 or 1146], any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

(As amended Nov. 6, 1978, P.L. 95-598, Title II, §249, 92 Stat. 2672).

REASONS WHY WRIT SHOULD ISSUE

The Third Circuit Court of Appeals has rendered a decision in serious conflict with the decisions of other Federal Courts of Appeals as well as with Supreme

Court decisions. Other Federal Court of Appeals and the Supreme Court have all held that a Declaratory Judgment action was proper in factual circumstances similar to the present case. This Court must exercise its discretionary review to insure uniformity of the law among the various Federal Appellate Circuits as well as to ensure that the present question is decided in a way not in conflict with applicable decisions of this Court.

The Circuit Court of Appeals has sanctioned a departure so far from the accepted usual course of judicial proceedings that this Court must exercise its power of supervision. That judicial economy will be served by permitting the Declaratory Judgment action to go forward at this time is indisputable. Therefore, the District Court's dismissal of Petitioner's Declaratory Judgment action is in direct contradiction to the primary function of a Declaratory Judgment action.

STATEMENT OF THE CASE

This action arises out of an automobile accident on October 5, 1980, allegedly caused by William E. Baker, who was driving a car owned by Eugene Thomas, in which accident Earl Longenecker and Maryjane Longenecker suffered serious injuries. The injuries to Maryjane Longenecker involved fractured ribs, a punctured lung and a ruptured spleen. The injuries to Earl Longenecker included severe contusions to both knees and facial lacerations. Earl Longenecker and Maryjane Longenecker reported this accident to their own automobile insurance carrier, Petitioner, Metropolitan Property & Liability Insurance Company ("Metropolitan"). This policy contained the usual protection from uninsured motorist coverage. (App. A-27). A tort claim on behalf of the Longeneckers has now been brought against William Baker. The Respondent, State Farm Mutual Automobile Insurance Company ("State Farm"), the insurance company for Eugene Thomas and for the

vehicle bring driven by William Baker, has declined to defend William Baker in the tort action or to be in any fashion responsible for William Baker, since William Baker allegedly had no permission to drive the vehicle owned by Eugene Thomas. (App. A-24, 25). Respondent American Motorist Insurance Company ("American Motorist"), is the insurance carrier for Dale Sprenkle, the step-father for William Baker, with whom William Baker resided as a minor. American Motorist has likewise declined to defend William Baker in the tort action or to be in any fashion responsible for William Baker. (App. A-26).

Petitioner initiated a Declaratory Judgment action against State Farm and American Motorist in an effort to contest the validity of these disclaimers. (App. A-16 et seq.). Respondents William Baker and the Longenecker s were named as nominal parties to the litigation. Petitioner specifically wished to raise various questions of law as to the correct interpretation of the insurance policies of State Farm and American Motorist.

Jurisdiction was based on diversity of citizenship with an amount in controversy exceeding $10,000.00.

Respondent American Motorist subsequently filed a Motion for Summary Judgment, which was joined in by Respondent State Farm, who took the position that these issues should be decided by Uninsured Motorist Arbitration. The Lower Court granted this Motion and entered Judgment in favor of Respondents against Petitioner on June 15, 1982. (App. A-1).

An Appeal was taken from that Order to the Court of Appeals for the Third Circuit. (No. 82-1427). The Court of Appeals remanded the case to the Lower Court to make a determination concerning the indispensability of Respondent William Baker and whether there was a sufficient case or controversy. (App. A-2 et seq.).

On October 7, 1983, the Lower Court issued an Order which held that this case was not justiciable in its present posture. (App. A-8 et seq.).

An Appeal was taken from that Order to the Court of Appeals for the Third Circuit. The Court of Appeals affirmed the Lower Court Order denying the declaratory relief to Petitioner, finding no abuse of discretion in the Lower Court's decision. (App. A-13 et seq.). The Court of Appeals did not discuss whether in its opinion a justiciable controversy presently exists.

ARGUMENT

I—THE THIRD CIRCUIT COURT OF APPEALS IMPROPERLY APPLIED THE ABUSE OF DISCRETION STANDARD OF REVIEW IN AFFIRMING THE DISTRICT COURT'S DISMISSAL OF PETITIONER'S PETITION FOR DECLARATORY RELIEF.

In its opinion, the Third Circuit Court of Appeals upheld the Lower Court's dismissal of Petitioner's Petition for Declaratory Judgment on the ground that the District Court had not abused its discretionary power. (App. A-13 et seq.). It is true that a grant of a Declaratory Judgment is a discretionary matter for the Trial Court. 28 U.S.C. §2201; *Interdynamics, Inc. vs. Wolfe,* 698 F.2d 157, 167 (3d Cir. 1982); *Muller vs. Olin Mathieson Chemical Corporation,* 404 F.2d 501, 505 (2d Cir. 1968). In the present case, however, the Trial Court never exercised its discretionary power.

On the contrary, the Trial Court considered Petitioner's Petition for Declaratory Judgment on its merits. Only after determining that no justiciable controversy presently existed was the Petition dismissed. (App. A-8 et seq.). It is clear that the dismissal Order entered was not based upon the exercise of the Trial Judge's discretion. The Court apparently assumed that it had no discretion. *See, ACandS, Inc. vs. Aetna Casualty & Surety Company,* 666 F.2d 819, 822 n.12 (3d Cir. 1981) (when Court considers the issue of justiciability in determining whether to grant Declaratory Judgment, it is assumed that Court elected not to use its discretionary power); *Muller, supra* at 505 (where Trial Judge found no justiciable controversy, it is clear that the dismissal Order entered was not based upon the exercise of Trial Court's discretion).

Since the dismissal was based on the District Court's finding that there was not a justiciable controversy, the fact that the Petition *could* have been dis-

missed as a matter of the District Court's discretion did not insulate the dismissal from independent Appellate review on the issue of justiciability. *See, Muller, supra* at 505. The Appellate Court had untrammeled power to review the District Court's decision without considering whether the District Court abused its discretionary power. *ACandS, supra* at 822 n.12; *Keene Corp. vs. Insurance Company of North America,* 667 F.2d 1034 (D.C. Cir. 1981), *cert. den.*, 102 S. Ct. 1644 (1982). The sole issue on Appeal to the Third Circuit was whether the Lower Court had properly applied the law in determining whether a case or controversy existed. *See, ACandS, supra* at 822.

Since, the Court of Appeals affirmed the Lower Court's Order without reviewing the grounds upon which the Lower Court based its decision, its decision was erroneous and should be reversed.

II—THE COURT OF APPEALS ERRONEOUSLY APPLIED THE ABUSE OF DISCRETION STANDARD IN AFFIRMING THE TRIAL COURT'S DISMISSAL OF PETITIONER'S COMPLAINT FOR DECLARATORY JUDGMENT.

Even assuming, arguendo, that the abuse of discretion standard is the appropriate standard of review, the Appellate Court erroneously applied this standard.

In determining whether declaratory relief is proper in a given situation the following factors are to be considered: 1) whether the judgment will serve a useful purpose in clarifying and settling the legal relations in issue; 2) whether it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceedings, and 3) whether other convenient remedies are available. *Interdynamics, Inc. vs. Wolfe,* 698 F.2d 157, 167 (3d Cir. 1982); *Alsager vs. District Court of Polk County, Iowa (Juv. Div.),* 518 F.2d 1160, 1164 (8th Cir. 1975).

It is Petitioner's contention that the Appellate Court abused its discretion in failing to consider any of these factors in its affirmance of the District Court's dismissal of Petitioner's Complaint. Furthermore, Petitioner contends that had these factors been considered in the Appellate Court, or any Court for that matter, that Court would have concluded that it should exercise its discretionary power, and consider the Declaratory Judgment Complaint on its merits.

Petitioner submits that a judgment by the Court declaring the respective liabilities of State Farm and American Motorists will conserve judicial resources and bring about a quick resolution of this entire matter. If the Court declares that Baker was a permissive user of the Thomas automobile and that State Farm and American Motorists accordingly share potential liability for the Longeneckers' recovery, the two Respondent insurers undoubtedly will seek shortly to settle the Longeneckers' claim. Alternatively, should the Court declare State Farm and American Motorists free of liability, Petitioner assuredly will not proceed any further against State Farm and American Motorists. In either case, not only will the state court action be quickly resolved, but any further legal proceedings by Plaintiff also would be forestalled.

If this Court agrees that there is no ripe controversy, the following scenario will have to occur for the coverage questions to be resolved. Petitioner will have to pay the uninsured motorist claim, bringing the underlying tort claim against the uninsured tortfeasor to fruition, and then pursue the coverage questions against State Farm and American Motorist in either an identical Declaratory Judgment action or in a garnishment action. This Court has frowned upon such a waste of judicial economy. *Provident Tradesmens Bank and Trust Co. vs. Patterson*, 88 S. Ct. 733, 390 U.S. 102, 19 L. Ed. 2d 936 (1968). Furthermore, the legal issues will in no way be significantly different than they presently are.

Accordingly, the Court of Appeal's application of its discretionary power represents a departure so far from the accepted usual course of judicial proceedings that this Court must exercise its power of supervision.

III—THERE IS A SUFFICIENT CONTROVERSY BETWEEN THE PARTIES WHICH IS RIPE FOR ADJUDICATION.

In the case at hand, under any analysis, a case or controversy clearly exists.

First and foremost, the District Court's determination that the present controversy is not yet ripe for judicial determination is in conflict with numerous Supreme Court decisions. For this reason alone, the Supreme Court must exercise its power of review.

An action is ripe for justiciable determination when "there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a Declaratory Judgment." *Maryland Casualty Company vs. Pacific Coal and Oil Company,* 312 U.S. 270, 273 (1941). Ripeness exists only where the controversy is concrete and substantial and not contingent on the happening of a hypothetical future event. *Id.* The Lower Court found that no controversy existed because no payment had been made by Metropolitan to the Longeneckers (App. A-8 et seq.). This Court has held, however, that an insurance company does have a "real" and justiciable interest in procuring a declaration of its rights and liabilities under its policy without having to first pay under that policy. *Aetna Life Insurance Company vs. Haworth,* 300 U.S. 227 (1937).

The "reality" of the instant controversy of which insurance company ultimately shall be liable to pay damages awarded the Longeneckers is beyond dispute. The Longeneckers have already brought suit against William Baker and have made a demand for Uninsured Motorist

Arbitration. The Respondent insurance carriers have refused to defend William Baker. (App. A-24, 25, 26). Thus, it is clear that there is a sufficient controversy which is ripe for relief.

This Court has held that there is a "justiciable controversy" sufficient for jurisdiction under circumstances similar to the present action. *Aetna Life Insurance Company vs. Haworth,* 300 U.S. 227 (1937). In *Aetna,* the Plaintiff insurance company had issued five life insurance policies providing for disability benefits in case of the insured's total disability. The insured, asserting that he was totally disabled, ceased paying premiums and notified the insurance company of his disability and that the policies were still inforced, but brought no suit to obtain disability benefits. The insurance company, denying his permanent disability, sought a judgment declaring that no disability benefits were due and that the policies had lapsed for failure to pay premiums. This Court held that the facts presented a justiciable controversy because conflicting claims had been made as to the existence of the policies and the liability. There was a "definite dispute" and, prior to the declaratory action, the parties had taken adverse positions with respect to their existing obligations.

The Declaratory Judgment Act, 28 U.S.C. §2201, provides in pertinent part:

> "In a case of actual controversy within its jurisdiction . . . any Court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

This Court has held that to be "ripe for determination" under the Declaratory Judgment Act, a "disagreement must not be nebulous or contingent but must have taken

on fixed and final shape so that a Court can see what legal issues it is deciding, what effect its decision will have on the adversaries, and some useful purpose to be achieved in deciding them." *Public Service Commission of Utah vs. Wycoff Company*, 344 U.S. 237, 244 (1951). It is difficult to imagine how anyone can doubt that the legal issues concerning the merits of this case have not taken on final shape or form. The Respondent insurance carriers have already refused to provide coverage for William Baker and the Longeneckers are pursuing a claim against the Petitioner under their uninsured motorist provisions. If the District Court's decision that this case is premature is allowed to stand, the identical case will be brought in the near future. The facts will be basically identical and the legal issues will not have changed. The Trial Court will still have to make a decision concerning the validity of the disclaimers of the Respondent insurance companies and interpret the policies of the Respondent insurance companies.

In addition to its inconsistency with Supreme Court precedent, the Trial Court decision is also inconsistent with numerous Federal Court decisions.

Whether a dispute is ripe for determination depends on whether the dispute has "taken on final shape so that the Court can see what legal issues it is deciding, the effect of the decision on the adversaries, and the useful purpose to be achieved in deciding them." *El Paso Building & Construction Trades Council vs. El Paso Chapter Associated General Contractors of America*, 376 F.2d 797, 800 (5th Cir. 1967) (validity of restrictive subcontracting clause in collective bargaining contract was ripe for determination even where clause was not yet enforceable because certain conditions had not yet been met.)

In the instant case, the parties have certainly taken adverse positions to each other. The Longeneckers have filed suit against William Baker. State Farm Insurance

Company and American Motorist Insurance Company have both issued disclaimers. The Longeneckers have demanded Uninsured Motorist Arbitration from Petitioner. There is certainly no hypothetical questions or advisory opinion asked to be given.

The District Court clearly erred in requiring that either payment to the Longeneckers or the imminency of payment was necessary in order for a Declaratory Judgment action to be brought. The fact that petitioner does not presently have a cause of action for a return of its moneys paid to its insureds against the Respondent insurance companies is not at all determinative of whether there is a sufficient controversy.

There is a long line of cases where Plaintiff insurers have brought Declaratory Judgment actions under similar circumstances without the need to have paid any money out. *Diamond Shamrock Corp. vs. Lumberman's Mutual Cas. Co.*, 416 F.2d 707 (7th Cir. 1969); *Nationwide Mutual Insurance Company vs. State Farm Automobile Insurance Company*, 312 F. Supp. 216 (W.D. Va. 1970) (uninsured motorist carrier brings action against liability carrier prior to paying any money out); *INA vs. American Home Assurance Co.*, 391 F. Supp. 1097 (D. Col. 1975); *United Services Auto Association vs. Royal-Globe Ins. Co.*, 511 F.2d 1094 (10th Cir. 1975); *Aetna Casualty and Surety Company vs. Nationwide Mutual Insurance Company*, 471 F. Supp. 1059 (M.D. Pa. 1959), *aff'd*, 620 F.2d 287 (3d Cir. 1980). Furthermore, it is clear that Petitioner need not have any contractual relationship with the Respondent insurers in order to bring a Declaratory Judgment action. *Diamond Shamrock, supra.*

In *Aetna, supra* the uninsured motorist carrier brought an indemnification action against the liability carrier under a wrongful disclaimer theory after the uninsured motorist carrier had paid its insured. The liability carrier raised the defense that the uninsured mo-

torist carrier should have brought a Declaratory Judgment action prior to payment of any money by the uninsured motorist carrier. The Court importantly noted that while a Declaratory Judgment could have been brought, the fact that one was not brought did not preclude the indemnification action.

The District Court completely misunderstood the uncontested facts which were presented to it when it described Metropolitan's request for a Declaratory Judgment as an attempt to have the Court address "ambiguous scenarios which are lurking in the background and which may some day mature into a real dispute." (App. A-11). It is true that Petitioner's action may be contingent upon it having to pay money to the Longeneckers. However, the Federal caselaw is replete with support for the proposition that contingent rights can form the basis on which a justiciable controversy can be adjudicated. *Lumbermens Mutual Casualty Company vs. Borden Co.*, 241 F. Supp. 683, 690 (S.D.N.Y. 1965).

> "It is clear that in some instances a declaratory judgment is proper even though there are further contingencies that will determine whether a controversy ever actually becomes real. The familiar type of suit in which a liability insurer seeks a declaration that it will not be liable to indemnify an insured person for any damages he may recover against the insured is an example. *The injured person may not sue or he may not obtain a judgment against the insured, but there is held to be a sufficient controversy between the insured and the injured person that a declaratory judgement is permissible.*"

Wright & Miller, 10 *Federal Practice & Procedure*, §2757 at 759 (emphasis supplied).

In the case sub judice, it is inevitable that Petitioner will have to pay money out to its insured. The contin-

gency of payment to the Longeneckers is not at all remote.

A good example of contingent rights being proper for a Declaratory Judgement action can be found in *Borden, supra*. Plaintiff insurance company brought suit against its insured, the Borden Co., and several other Defendants which provided insurance coverage to the same insured on the basis that the other carriers, and not Plaintiff, owed coverage to Borden for various claims that the insured had made under Plaintiff's insurance policy. The Defendant insurance companies argued that Plaintiff may never have to pay Borden so that there could be no real controversy between Plaintiff and the Defendant insurance companies. The Court agreed to declare the respective rights and liabilities of the various insurance companies *before* Plaintiff paid any money to its insured.

The instant action does not differ in essential posture from the *Borden* scenario. Petitioner has received uninsured motorist claims from its insureds. Petitioner believes that these claims are more properly compensable by the two Respondent carriers. A declaration of their liability would, in effect, be a declaration of Petitioner's non-liability, and vice-versa.

Under the rationale of the Declaratory Judgment Act, there is no need for Petitioner to have paid under its insurance policy with its insureds before bringing this action.

> "The essential distinction between a declaratory judgment action and an action seeking other relief is that in the former no actual wrong need have been committed or a loss have occurred in order to sustain the action. The purpose of the declaratory judgment action is to settle actual controversies before they ripen into violations of law or a breach of duty."

U.S. vs. Fisher-Otis Co., 496 F.2d 1146, 1151 (10th Cir. 1974) (citation omitted).

"The whole reason for the enactment of the [Declaratory Judgment Act] was to declare the rights of parties and grant further and proper relief, though in a strict sense, no cause of action had accrued." *Borden Co., supra* at 698.

"The right of an insurer to be immune from claims under a policy of insurance is a 'right' which the insurer may have declared under the Declaratory Judgment Act, provided a valid 'controversy' exists as to the insured's liability." *Maryland Casualty Company v. Havens*, 24 F. Supp. 460, 461 (M.D. Pa. 1938). In *Havens*, the insurer for a bridge contractor claimed that the policy had expired before Plaintiff's husband was killed. The Plaintiff had won judgment against the contractor and was threatening to institute an action to recover against the insurer. The insurer consequently filed a declaratory judgment action for a determination of coverage and, hence, liability. The Court held that such a declaratory judgment action was justiciable.

Even if the Longeneckers had not yet filed a tort action in state Court against William Baker, Petitioner's request for declaratory relief would not be premature. Several authorities have long held that underlying suits are not a prerequisite for declaratory relief by an insurance carrier. For example, in *Ohio Casualty Insurance Company v. Maloney*, 44 F. Supp. 312 (E.D. Pa. 1942), the insurer of a dairy delivery service sought a declaratory judgment with respect to an automobile accident arising when an employee of the dairy used one of the delivery trucks without the dairy's knowledge or permission and the victims claimed that the insurer's policy provided coverage for the employee-tortfeasor. However, the victims had not yet brought suit. The Court found the controversy to be properly justiciable and observed:

> "Here there is a dispute between parties who face each other in an adversary proceeding. It is not necessary that any of the Defendant [injured victims] should have obtained a judgment or even started an action against the Plaintiff [insurer]. It is enough that they have asserted claims against the Plaintiff grounded on the provisions of the insurance policy. The Declaratory Judgment Act is procedural. Its purpose is to adjust controversies which are in esse but not actually crystallized in litigation." [Citation omitted.] *Ibid* at 313-314.

Similarly, in *Manhattan Fire and Marine Insurance Company v. Nassau Estates II*, 217 F. Supp. 196 (D.N.J. 1963), the Court again held that a pending suit is not a prerequisite for declaratory relief. There, the insurer brought an action for declaratory judgment against its insured for a determination of liability under its policy for damages resulting from personal injuries sustained by a minor while on the insured's property. The insurer claimed that its insured failed to give notice of the accident as soon as practicable, as required by the policy. The insured moved for dismissal on grounds that the action did not present a justiciable controversy since the minor had not yet filed suit for injuries sustained. Nevertheless, the Court held that declaratory relief was appropriate:

> "Although no action is as yet pending in behalf of the accidentally injured infant, the insurer is on actual notice of the occurrence of the accident, and of the severity of the injuries. *An action may be brought in behalf of the infant at any time* between the date of the happening of the accident and two years next succeeding his attainment of majority. *Meanwhile, unless the insurer can secure an adjudication respecting its liability under the policy,* upon the facts alleged in the Complaint, *it may be put to the labor and expense of investigation* which

> may, several years later, be found to have been for naught." (Emphasis supplied) *Ibid* at 198.

Similarly, in *State Farm Mutual Automobile Insurance Company v. Sampson*, 305 F. Supp. 50 (M.D. Fla. 1969), *aff'd*, 428 F.2d 475 (5th Cir. 1970), the District Court held that declaratory relief would be granted despite the lack of an underlying suit. There, the insurer brought a declaratory judgment action to determine which of two automobile policies had primary coverage for liability arising out of an automobile accident with a motorcycle. State Farm was the carrier for the driver while another insurance company provided coverage for the automobile. The Court held that a declaration of State Farm's rights would be appropriate in this situation even though the injured cyclists had not yet filed suit against either State Farm or the other insurer.

> "Neither of the insured motorcycle riders, nor their parents, have as yet filed actions against the other parties in this suit for personal injuries and property damage. However, it is obvious that suit is imminent pending the outcome of this litigation and the Court finds that under the circumstances the lack of a pending claim or a Court suit by the injured parties should not be a barrier to jurisdiction and a declaration of rights in this action." *Ibid* at 52.

The District Court simply ignored these cases and their rationale which clearly permit a declaration of contingent obligations. Importantly, in holding that Petitioner's request for relief was premature, the Trial Court failed to provide any authority in support of its holding, even though its holding was contrary to established principles of law.

The Third Circuit Court of Appeals has noted that a declaratory judgment action on the question of the respective obligations of various insurance carriers to defend and indemnify is justiciable where "(t)he factors that will determine the relative duties and benefits un-

der the insurance contracts are independent of the underlying claims and are being presented in an adversarial context by parties with adverse interests." *ACandS, Inc. v. Aetna Casualty & Surety Company*, 666 F.2d 819 (3rd Cir. 1981.)[1]

The instant declaratory judgment action likewise involves factors different from the underlying tort claim. Whether William Baker has coverage under either policy will not be determined by the underlying claim which is only concerned with whether William Baker was negligent. Whether William Baker did or did not have permission to drive the Thomas motor vehicle is likewise a question completely separate from the underlying claim. Whether any of the exclusions in American's or State Farm's respective policies are applicable are questions that cannot be answered in the tort action. These are not hypothetical questions but rather issues already being presented in an adversarial context.

In *ACandS, supra*, the District Court had dismissed the declaratory judgment action on the basis that there could be no justiciable issue if there was no judgment in the underlying claim.

The Court of Appeals, in reversing the District Court, observed:

> "The inescapable indication of the actuality of this controversy is that a liability insurer's indemnification agreement carries with it not only an obligation to pay judgments against the insured but also, in the real world, to pay settlement amounts. Indeed liability insurers owe fiduciary obligations to their insured with respect to the consideration of settlement negotiations. It would turn the reality of the claims adjustment process on its head to hinge

1. The D.C. Circuit Court of Appeals has held similarly. *Keene Corp. vs. INA, supra* (1981). Since the factors of the underlying tort action have no relevance to the determination of the policies' applicability, the declaratory judgment action was justiciable.

> justiciability of an insurance agreement on the maturation of a suit to a judgment *when the overwhelming number of disputes are resolved by settlement*. The respective interests and obligations of insured and insurers, when disputed, require determination much in advance of judgment since they will designate the bearer of the ultimate liability in the underlying cases and hence the bearer of the onus and risks of settlement. So viewed, the controversy is then quite proper for a judicial determination now. To delay for the sake of more concrete development would prevent the litigants from shaping a settlement strategy and thereby avoiding unnecessary costs."
> 666 F.2d at 823. (Emphasis supplied)

The Appellate Court's affirmance of the Trial Court's finding that no case or controversy existed was erroneous and clearly in conflict with numerous other Federal Appellate Circuits and District Courts. This Court must utilize its review power to ensure that all the Federal Courts apply Federal law in a uniform manner.

CONCLUSION

The Appellate Court improperly applied the abuse of discretion standard of review in affirming the District Court's dismissal of Petitioner's Petition for Declaratory Judgment. An independent assessment of whether a case or controversy presently exists is the correct standard of review. Even assuming, arguendo, that the abuse of discretion standard is the appropriate standard of review, the Appellate Court erroneously applied this standard. This case clearly presents issues where the parties have taken adversarial positions and is certainly justiciable. Both the Appellate Court and District Court decisions below are inconsistent with Supreme Court and Federal Court precedent, and sanction a departure far from the accepted usual course of judicial proceedings. Accordingly, this Court must exercise its supervisory power of review.

Respectfully submitted,
POST & SCHELL, P.C.

STANLEY P. STAHL, Esquire
ALLAN C. MOLOTSKY, Esquire

Attorneys for Petitioner

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

METROPOLITAN PROPERTY AND LIABILITY INSURANCE CO.	:	CIVIL ACTION
v.	:	
EARL M. LONGENECKER and MARY JANE LONGENECKER and WILLIAM E. BAKER and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and AMERICAN MOTORISTS INSURANCE COMPANY	:	NO. 81-2867

ORDER

AND NOW, TO WIT, this 14th day of June, 1982, upon consideration of the motion of defendants American Motorists Insurance Co., which has been joined in by defendants State Farm Mutual Automobile Insurance Co., Earl M. Longenecker and Mary Jane Longenecker, and also upon consideration of plaintiff's memorandum of law in answer to defendants' motion and plaintiff's reply memorandum, IT IS ORDERED as follows:

1. Defendants' motion for summary judgment is *granted* on the ground that disputed issues of fact like those involved here must be resolved by arbitration; *Grange Mutual Casualty Co. v. Pennsylvania Manufacturers' Association Insurance Co.*, 438 Pa. 95, 263 A.2d 732 (1970); *National Grange Mutual Insurance Co. v. Kuhn*, 428 Pa. 179, 236 A.2d 758 (1968);

2. Judgment is *entered* in favor of defendants Earl M. Longenecker, Mary Jane Longenecker, William E. Baker, State Farm Mutual Automobile Insurance Company and American Motorists Insurance Company, and against plaintiff Metropolitan Property and Liability Insurance Company.

Louis C. Bechtle, J.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1427

METROPOLITAN PROPERTY AND LIABILITY INSURANCE COMPANY,

Appellant

v.

EARL M. LONGENECKER, MARY JANE LONGENECKER, WILLIAM E. BAKER, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, AMERICAN MOTORISTS INSURANCE COMPANY,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Civil No. 81-2867)

Argued January 11, 1983
Before: WEIS, SLOVITER and BECKER,
Circuit Judges.
(Opinion filed February 7, 1983)

Allan C. Molotsky, Esq.
(ARGUED)
Stanley P. Stahl, Esquire
Post & Schell, P.C.
210 East Washington Square
Philadelphia, PA 19106
Attorneys for Appellant

James P. Bradley, Esq.
(ARGUED)
Suite 620, 841 Chestnut Street
Philadelphia, PA 19107
Attorney for Appellee American Motorists Insurance Company

Rocco P. Imperatrice, III,
Esquire
Cramp, D'Iorio, McConchie
& Forbes, P.C.
215 N. Olive Street
Media, Pennsylvania 19063
Attorneys for Appellee
State Farm Mutual
Insurance Company

Dusan Bratic, Esquire
No. 4 U.S. Route 15, North
Dillsburg, PA 17019
Attornerys for Appellees, Earl
M. and Mary Jane Longenecker

MEMORANDUM OPINION

WEIS, *Circuit Judge.*

In this diversity case, the plaintiff, Metropolitan Property and Liability Insurance Company, seeks a declaratory judgment establishing whether automobile liability insurance coverage was in effect for William E. Baker on October 5, 1980. On that day, Baker was driving an automobile that collided with one operated by Earl Longenecker. As result of the accident, Earl and his wife, Mary Jane, sustained personal injuries.

The plaintiff's policy provided uninsured motorist coverage for the Longeneckers. According to the Longeneckers' brief,[1] their policy defines an uninsured motor vehicle as one whose liability insurance carrier "denies coverage." The Metropolitan policy also states that "[i]f we and any person do not agree about that per-

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1. Even though the plaintiff seeks a declaration of its obligations under its own policy, it did not attach a copy of the policy to its complaint. That deficiency should be corrected on remand.

son's right to recover damages, or the amount of damages," the dispute is to be arbitrated. The State Farm Mutual Automobile Insurance Company and the American Motorists Insurance Company have both formally denied coverage on the automobile Baker was driving at the time of the accident.

Metropolitan's complaint listed Baker, the Longeneckers, State Farm, and American Motorists as defendants. Baker and the Longeneckers are citizens of Pennsylvania, and the three insurance companies are citizens of different states. Thus, as filed, the complaint states the complete diversity required for jurisdiction.

Metropolitan asked the court to declare that State Farm and American Motorists offered coverage to Baker, that Metropolitan's uninsured motorist coverage is not applicable, and that the Longeneckers be prohibited from pursuing any action against Metropolitan until the respective coverage questions are resolved. The district court granted summary judgment for the defendants on the ground that state law requires disputed issues of fact, like those present in this case, to be resolved by arbitration. The court did not discuss the fact that the arbitration clause applies only as between the Longeneckers and the Metropolitan, and not to the other two insurance companies.[2]

We do not pass on the merits of the district court's decision because we are met by jurisdictional problems at the outset. In determining whether diversity jurisdiction exists, the plaintiff's designation of parties as defendants is not binding, and the court may realign them to

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2. The parties have cited the case of Grange Mutual Casualty Co. v. Pennsylvania Manufacturers' Association Insurance Co., 438 Pa. 95, 263 A.2d 732 (1970), as authoritative Pennsylvania law on the issue of arbitration. We point out once again that an opinion, as in that case, joined in by less than a majority of the court has no precedential value. *See* Vargus v. Pitman Manufacturing Co., 675 F.2d 73 (3d Cir. 1982).

conform with their actual interests. The test is whether the parties with the same ultimate interests are on the same side. *See* 13 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §3607, at 641 (1975).

Metropolitan seeks to relieve itself from liability under its uninsured motorist clauses by establishing that Baker was covered by either or both State Farm and American Motorists. The latter two insurance companies are therefore properly listed as defendants. But, by trying to establish coverage for Baker, Metropolitan is directly serving his interest, or at least it would appear so as we read the record at this point. Consequently, it would seem that Baker should properly be designated as a plaintiff.

Just where the Longeneckers' interest lies is not apparent from the record. They have instituted a tort claim in the state court against Baker, and, in that context, seemingly would be benefited by a finding that the defendant companies did insure him. All, however, may not be what it seems. The Metropolitan uninsured motorist section, as we read it, also includes underinsured coverage. Therefore, depending on the severity of their injuries and the respective limits of the applicable policies, the Longeneckers may fare equally well whether Baker is uninsured or insured.

Adding to the Longeneckers' equivocal posture is the likelihood that their right to recover from Metropolitan has already been established by the mere fact that State Farm and American Motorists denied coverage to Baker, regardless of the justification for their position.[3] *See St. Paul Mercury Insurance Co. v. American Arbitration Association*, 425 Pa. 548, 229 A.2d 858 (1967).

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3. The Longenecker's counsel requested arbitration in a letter to Metropolitan's counsel dated May 28, 1982. Apparently, however, nothing has occurred since that time.

This situation suggests an adverse interest between Metropolitan and the Longeneckers, and on that basis they may properly be listed as defendants.

If Baker is realigned as a plaintiff and the Longeneckers remain as defendants, diversity of jurisdiction will be destroyed. At oral argument, counsel for Metropolitan sought to resolve the problem by dismissing Baker since he has not filed an answer nor appeared by counsel. An appellate court may dismiss a nonadverse party if necessary to preserve diversity jurisdiction. *Ross v. International Brotherhood of Electrical Workers*, 634 F.2d 453, 456 (9th Cir. 1980).

The question remains, however, whether Baker is an indispensable party within the meaning of Fed. R. Civ. P. 19(b). If he is, he may not be dropped as a party to preserve jurisdiction. *See Publicker Industries v. Roman Ceramics*, 603 F.2d 1065, 1069 (3d Cir. 1969); 3 J. MOORE'S FEDERAL PRACTICE ¶ 19.03.01 at 19-53 (1982). At least superficially, the relationship between Baker and the defendant insurance companies would appear to require his presence in the litigation. Because the question of indispensability may require some fact finding and because of the ambiguous position of the Longeneckers, we conclude that the jurisdictional issue should first be addressed by the district court.

One additional matter should also be determined on remand — that is, whether Metropolitan has an actual dispute with the State Farm and American Motorist insurance companies at this time. If Metropolitan had paid the Longeneckers and became subrogated to their interests, the controversy would be a live one. Until Metropolitan has made a payment, however, there is some question whether it has only a potential and contingent obligation, and not a definite and concrete dispute as will satisfy the case or controversy requirement. *Cf. ACandS, Inc. v. Aetna Casualty Co.*, 666 F.2d 819 (3d Cir. 1981). We do not pass upon the issue here.

Accordingly, this case will be remanded to the district court for further proceedings consistent with this opinion.

TO THE CLERK:

Please file the foregoing opinion.

Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

METROPOLITAN PROPERTY AND LIABILITY INSURANCE COMPANY	:	CIVIL ACTION
v.	:	
EARL M. LONGENECKER, MARY JANE LONGENECKER, WILLIAM E. BAKER, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and AMERICAN MOTORISTS INSURANCE COMPANY	:	NO. 81-2867

October 7, 1983

MEMORANDUM AND ORDER

BECHTLE, J.

This is a diversity action for declaratory judgment by Metropolitan Property and Liability Insurance Company which seeks to establish whether automobile liability insurance coverage was in effect for the driver of an automobile which collided with one operated by the insurance company's insureds, Earl and Mary Jane Longenecker. This Court previously granted summary judgment for the defendants based on an arbitration clause in the insurance contract between Metropolitan and the Longeneckers. This Memorandum follows an appeal of that decision by Metropolitan and a remand of the case by the Third Circuit for further proceedings consistent with its opinion.

The case arises from an automobile collision which occurred on October 5, 1980, between a car driven by William Baker and one driven by Earl Longenecker. As a result of the accident both Earl Longenecker and his wife, Mary Jane Longenecker, sustained personal injuries.

The Longeneckers were insured by Metropolitan under a policy providing both uninsured and underinsured motorist coverage. The Metropolitan policy defi-

nition of an uninsured vehicle includes vehicles which have a policy in effect at the time of the accident but the carrier denies coverage. The Metropolitan policy also provides for arbitration of the uninsured motorist provision if there is a disagreement as to any person's right to collect damages under that provision or the amount of damages. Both State Farm Mutual Automobile Insurance Company and American Motorists Insurance Company have denied coverage on the automobile Baker was driving. State Farm is the insurer of Eugene Thomas, the owner of the vehicle driven by Baker. American Motorists is the insurer of Dale Sprenkle, the step-father of Baker with whom Baker resided as a minor at the time of the accident.

In bringing this diversity action, Metropolitan sought a declaration of its obligations under its own policy given the possible existence of coverage on behalf of Baker under either the State Farm or the American Motorists policies. Metropolitan's complaint named Baker, the Longeneckers, State Farm and American Motorists as defendants. The three insurance companies are citizens of different states and Baker and the Longeneckers are citizens of Pennsylvania. Facially at least, the requirements of diversity were met. However, upon review of this Court's grant of summary judgment for defendants due to the arbitration clause, the Third Circuit indicated that a jurisdictionally defeating realignment of the parties might be warranted in view of their actual interests. Remand was ordered to resolve this issue and the resulting question of the indispensability of certain parties whose presence would defeat jurisdiction if a realignment occurred. In addition, this Court was directed to determine whether Metropolitan had actually made any payment to the Longeneckers so that it had become subrogated to their interests. If not, the existence of a definite and concrete dispute as would satisfy the Article III case or controversy requirement would be subject to doubt.

Initially, attention must be given to the case or controversy issue since Metropolitan admitted in a hearing held in open Court on September 27, 1983, that Metropolitan had made no payment to the Longeneckers. If there is no actual case or controversy, then the matter at hand is not justiciable and the Court has no power to grant declaratory relief. *Maryland Casualty Co. v. Pacific Coal and Oil Co.*, 312 U.S. 270, 273 (1941). A justiciable controversy is to be distinguished from a dispute of a hypothetical or abstract character or one which is merely academic or moot. *ACandS, Inc. v. Aetna Cas. & Sur. Co.*, 666 F.2d 819 (3d Cir. 1981). The difference is necessarily one of degree. The basic question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy between parties having "adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, *supra*, 312 U.S. at 273.

Applying these principles to the facts at hand, this Court concludes that there is no case or controversy in existence between Metropolitan and the other two insurance companies, State Farm and American Motorists, at this time. Metropolitan has taken the position that as there is no doubt that it will have to pay the Longeneckers on their claim, there is no doubt that there *will be* an indemnification claim by Metropolitan against State Farm and American Motorists and this is sufficient for declaratory judgment purposes. The fact still exists, however, that to date no payment has been made to the Loingeneckers by Metropolitan. Moreover, while the position of Metropolitan might have been persuasive if its payment to the Longeneckers were imminent, counsel for Metropolitan indicated at the September 27, 1983 hearing that the carrier is still in the stage of casual correspondence with its insured as to the amount of their damages. The liability dispute between Metropolitan and the Longeneckers has not even devel-

oped to the level of actual negotiation. As such, Metropolitan's future claim for indemnification from either State Farm or American Motorists or both is not of "sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Metropolitan's conceptual view of its right to demand a declaration of its rights does not satisfy this Court's constitutional mandate to address itself to actual cases of controversies and not to ambiguous scenarios which are lurking in the background and which may someday mature into a real dispute. At present, Metropolitan's request for declaratory relief is premature. Accordingly, the case shall be dismissed as not justiciable.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

METROPOLITAN PROPERTY AND LIABILITY INSURANCE CO.	:	CIVIL ACTION
V.	:	
EARL M. LONGENECKER, MARY JANE LONGENECKER, WILLIAM E. BAKER, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and AMERICAN MOTORISTS INSURANCE COMPANY	:	NO. 81-2867

ORDER

AND NOW, TO WIT, this 7th day of October, 1983, for the reasons stated in the foregoing Memorandum, IT IS ORDERED that the suit is *dismissed*.

LOUIS C. BECHTLE, J.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1819

METROPOLITAN PROPERTY AND LIABILITY INSURANCE COMPANY,

Appellant

v.

EARL M. LONGENECKER, MARY JANE LONGENECKER, WILLIAM E. BAKER, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, and AMERICAN MOTORISTS INSURANCE COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 81-2867)

District Judge: Honorable Louis C. Bechtle

Argued January 11, 1983
Before: WEIS and BECKER, *Circuit Judges*, and OLIVER, *District Judge*.*

Filed June 18, 1984

MEMORANDUM OPINION OF THE COURT

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* The Honorable John W. Oliver, United States District Judge for the Western District of Missouri, sitting by designation.

WEIS, *Circuit Judge*.

This is the second time that plaintiff has taken an appeal to the court in this case. On the first occasion, we remanded to the district court for determinations on whether diversity jurisdiction is present and whether an actual dispute exists between plaintiff Metropolitan and the other two insurance companies, State Farm and American Motorists.

After further briefing and argument, the district court concluded there was no existing case or controversy, noting particularly that Metropolitan had not yet made any payment to its insureds, the Longeneckers. Indeed, the court said that Metropolitan is "still in the stage of casual correspondence with its insured as to the amount of their damages." The liability dispute between them "has not even developed to the level of actual negotiation." We note that the accident occurred on October 5, 1980, more than three years ago.

The district court concluded that Metropolitan's future claim for indemnification from State Farm or American Motorists was not of sufficient immediacy to warrant the issuance of a declaratory judgment. The court said, "Metropolitan's request for declaratory relief is premature." Accordingly, the case was dismissed.

As we pointed out in our first opinion, the Longenecker's counsel had requested arbitration on their uninsured and underinsured claim with Metropolitan in a letter dated May 28, 1982. Seemingly, nothing has been accomplished in that direction although more than two years have gone by. We noted also that it is possible that the Longeneckers have no real interest in whether Baker was insured because their own policy may perhaps be adequate.

The grant of a declaratory judgment is a discretionary matter for the district court. 28 U.S.C. §2201; *see Interdynamics, Inc. v. Wolf*, 698 F.2d 157, 167 (3d Cir. 1982); *Exxon Corp. v. Federal Trade Commission*, 588 F.2d 895, 900 (3d Cir. 1978); *Bituminous Coal Opera-*

tor's Assn. v. International Union, United Mine Workers, 585 F.2d 586, 596 (3d Cir. 1978). Judge Bechtle referred to the "ambiguous scenarios which are lurking in the background and which may some day mature into a real dispute." His doubt as to the advisability of granting declaratory relief at this stage of the events is quite understandable.

In view of the circumstances in this case, which we have twice reviewed, we find no abuse of discretion in the district court's decision to withhold declaratory relief at this time.

Accordingly, the order of the district court will be affirmed.

TO THE CLERK:

Please file the foregoing opinion.

Circuit Judge

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

METROPOLITAN PROPERTY AND LIABILITY INSURANCE COMPANY	CIVIL ACTION File No. 81-2867
Plaintiff	SUMMONS
v.	
EARL M. LONGENECKER MARY JANE LONGENECKER WILLIAM E. BAKER STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY AMERICAN MOTORISTS INSURANCE COMPANY	
Defendant	

To the above named Defendant:

Your are hereby summoned and required to serve upon Allen C. Molotsky, Esq. plaintiff's attorney, whose address Post & Schell, 210 W. Washington Sq., Phila. Pa. 19106 an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Michael E. Kunz
Clerk of Court
James Hamilton
Deputy Clerk
[Seal of Court]

Date: July 20, 1981

NOTE:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

NOTICE OF RIGHT TO CONSENT TO DISPOSITION OF A CIVIL CASE BY A UNITED STATES MAGISTRATE

In accordance with the provisions of 28 U.S.C. §636(c), you are hereby notified that pursuant to Local Rule 7(h) the United States magistrates of this district, in addition to their other duties, may, upon the consent of all the parties in a civil case, conduct any or all proceedings in a civil case, including a jury or non-jury trial, and order the entry of a final judgment. Appropriate consent forms for this purpose are available from the clerk of court.

Your decision to consent, or not to consent, to the referral of your case to a United States magistrate for disposition is entirely voluntary and should be communicated solely to the clerk of the district court. Only if all the parties in the case consent to the reference to a magistrate will either the judge or magistrate be informed of your decision.

The judge will then decide whether or not to refer the case to a magistrate for disposition but no action eligible for arbitration will be referred by consent of the parties until the arbitration has been concluded and trial *de novo* demanded pursuant to Local Rule 8.7. The court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate.

When a case is referred to a magistrate for all further proceedings, including the entry of final judgment, the final judgment may be appealed directly to the Court of Appeals for the Third Circuit, unless the parties elect to have the case reviewed by the appropriate district judge (in which event any further appeal to the Court of Appeals would only be by petition for leave to appeal). Accordingly, in executing a consent form, you will be asked to specify which appeal procedure you elect.

Nothing herein shall be construed to be a limitation of any party's right to seek review by the Supreme Court of the United States.

MICHAEL E. KUNZ
Clerk, United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

METROPOLITAN PROPERTY AND LIABILITY INSURANCE COMPANY 700 Quaker Lane Warwick, Rhode Island 02887	:	CIVIL ACTION:
v.	:	
EARL M. LONGENECKER 2220 Locust Road Dover, Pa.	:	
and	:	
MARY JANE LONGENECKER 2220 Locust Road Dover, Pa.	:	
and	:	
WILLIAM E. BAKER 147 N. Penn Street York, Pa.	:	
and	:	
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY 1 State Farm Plaza Bloomington, Ill. 61701	:	
and		
AMERICAN MOTORISTS INSURANCE COMPANY Long Grove, Ill. 60049	:	

COMPLAINT—DECLARATORY JUDGMENT

1. Plaintiff, Metropolitan Property and Liability Insurance Company (Metropolitan), is a corporation organized and existing under the laws of the State of Rhode Island, with its principal place of business in the State of Rhode Island.

2. Defendant, Earl Longenecker, is an individual and a citizen of Pennsylvania.

3. Defendant, Mary Jane Longenecker, is an individual and a citizen of Pennsylvania.

4. Defendant, William E. Baker, is an individual and a citizen of Pennsylvania.

5. Defendant, State Farm Mutual Automobile Insurance Company (State Farm), is a corporation organized and existing under the laws of the State of Illinois, which is doing business in the Eastern District of Pennsylvania.

6. Defendant, American Motorists Insurance Company (American Motorists), is a corporation organized and existing under the laws of the State of Illinois, which is doing business in the Eastern District of Pennsylvania.

7. Jurisdiction of this action is founded on diversity of citizenship, 28 U.S.C. Section 1332, the amount in controversy exceeding the sum of $10,000, exclusive of interest and costs. Declaratory and further relief is requested under 28 U.S.C. Sections 2201-2202.

8. On or about October 5, 1980, Defendant, William E. Baker, while driving Eugene Thomas' Chevrolet Vega with a Pennsylvania Registration Number 266-99B collided with a vehicle driven by Earl Longenecker in which Mary Jane Longenecker was a passenger.

9. At some time prior to October 5, 1980, Defendant, American Motorists, issued and delivered to Josephine Sprenkle, the mother of Defendant, William E. Baker, its standard automobile policy which provide automobile liability coverage to Defendant, William E. Baker, being policy #HZ 782-434.

10. At some time prior to October 5, 1980, Defendant, State Farm, issued and delivered its standard automobile policy to Eugene Thomas, which policy of insurance included liability coverage for drivers of Eugene Thomas' aforesaid Chevrolet Vega, being policy # 540-4975-E28-38D.

11. At some time prior to October 5, 1980, Plaintiff, Metropolitan issued and delivered its standard automobile policy to Defendants, Earl and Mary Jane Longenecker, being policy # 186-095-255.

12. Earl Longenecker has allegedly sustained serious injuries as a result of this accident, including severe contusions in both knees and facial lacerations, and has collected approximately $615.00 in "No-Fault" automobile insurance benefits.

13. Mary Jane Longenecker has allegedly sustained serious injuries as a result of this accident, including fractured ribs, a punctured lung and ruptured spleen.

14. Mary Jane Longenecker herself has made a claim for "No-Fault" automobile benefits through Metropolitan and has collected nearly $20,000 thus far as a result of this accident. Such claim is continuing.

15. It is substantially certain that Mary Jane Longenecker and Earl Longenecker will bring a tort action against William E. Baker for their personal injuries which were sustained as a result of this accident.

16. On or about January 21, 1981, Defendant, State Farm, issued a denial letter to Plaintiff, Metropolitan, indicating that it would be disclaiming responsibility for any liability claims arising out of the October 5, 1980 accident. (Exhibit "A")

17. Defendant, American Motorists, has disclaimed any responsibility for any liability claims arising out of the October 5, 1980 accident.

18. Defendants, Earl and Mary Jane Longenecker, have retained an attorney to investigate the possibility of pursuing an Uninsured Motorist action against Metropolitan, since the alleged tortfeasor of the underlying October 5, 1980 accident, William E. Baker, appears now to be without insurance due to the disclaimers of American Motorists and State Farm.

19. In all probability, Defendants, Earl and Mary Jane Longenecker, will, indeed, pursue an Uninsured Motorist action against Plaintiff, Metropolitan.

20. The insurance issued by State Farm provides defense and indemnification coverage for Defendant, William E. Baker, with respect to any claims that Defen-

dants, Earl and Mary Jane Longenecker, may make against Defendant, William E. Baker.

21. The insurance issued by American Motorist provides defense and indemnification coverage for Defendant, William E. Baker, with respect to any claims that Defendants, Earl and Mary Jane Longenecker, may make against Defendant, William E. Baker.

22. Since the aforesaid disclaimers by American Motorist and State Farm were improper and invalid, William E. Baker cannot be an uninsured motorist within the meaning of Plaintiff's policy and Metropolitan has, therefore, brought this action seeking a Declaratory Judgment that its uninsured motorist provisions are not applicable because there is valid and collectible insurance in effect covering defendant, William E. Baker.

WHEREFORE, Plaintiff respectfully demands relief against Defendants as follows:

(1). the entry of a Declaratory Judgment that the insurance issued by State Farm provides coverage for both defense and indemnification for any claim made by Defendants, Earl and Mary Jane Longenecker, against Defendant, William E. Baker;

(2). the entry of a Declaratory Judgment that the insurance issued by American Motorists provides coverage for both defense and indemnification for any claim made by Defendants, Earl and Mary Jane Longenecker, against Defendant, William E. Baker;

(3). the entry of a Declaratory Judgment that the Metropolitan uninsured motorist provisions are not applicable because there is valid and collectible insurance in effect covering defendant, William E. Baker.

(4). the entry of an Order prohibiting Defendants, Earl and Mary Jane Longenecker, from pursuing any Uninsured Motorist action against Metropolitan until the insurance coverage questions are resolved.

(5). for such other and further relief as this Court may deem just.

POST & SCHELL, P. C.

ALLAN C. MOLOTSKY
Attorney for Plaintiff
METROPOLITAN PROPERTY
AND LIABILITY
INSURANCE COMPANY

January 21, 1981

Metropolitan Property and
Liability Insurance Company
P.O. Box 311
King of Prussia, PA 19406
Attn: Kathryn S. Witcoski

Our Insured:	Kay E. Thomas
Claim No.	38-5624-062
Your Insured:	Earl Longenecker
Claim No.	H30 0006AC
Date of Loss:	10/5/80

Dear Kathy:

As a follow-up to my letter of January 14, 1981, we are denying any liability claims arising out of the above captioned accident.

Thank you for calling.

Very truly yours,

_____

Janice F. Oree
Sr. Claim Service Representative

JFO/cah

Exhibit "A"

January 14, 1981

Metropolitan Property and
Liability Insurance Company
P.O. Box 311
King of Prussia, PA 19406
Attn: Kathryn S. Witcoski

Our Insured:	Kay E. Thomas
Claim No.	38-5624-062
Your Insured:	Earl Longenecker
Claim No.	H30 00006AC
Date of Loss:	10/5/80

Attn: Kathryn S. Witcoski

Dear Kathy:

This is a follow-up to our conversation of January 13, 1981. We are denying any property damage claims due to the above captioned accident because our insured's vehicle was in the hands of a thief at the time of the loss.

If you have any further questions please feel free to call.

Very truly yours,

Janice F. Oree
Sr. Claim Service Representative

JFO/cah

April 2, 1982

Allan C. Molotsky, Esquire
12th Floor
210 West Washington Square
Philadelphia, Pa. 19106

Re: Metropolitan Property & Liability Insurance Co. v.
Earl M. Longenecker, et al.
Our File No.: 22 AM 104509

Dear Mr. Molotsky:

In accordance with your letter of March 29, 1982, I am enclosing the Sprenkle automobile policy.

My client is not willing to afford coverage to Mr. Baker under this policy.

Very truly yours,

James P. Bradley

JPB/db

enc.

CC: Dusan Bratic, Esquire
Andrew J. Forbes, Esquire

METROPOLITAN PROPERTY AND
LIABILITY INSURANCE COMPANY

PROTECTION AGAINST UNINSURED MOTORISTS COVERAGE

COVERAGE PROVIDED

We will pay bodily injury damages which you are legally entitled to collect from the owner or driver of an uninsured highway vehicle. We will give you the same protection with respect to an underinsured highway vehicle. Any other person occupying a covered automobile has the same rights as you.

Whether any person is legally entitled to collect damages, and the amount to which such person is entitled, will be determined by agreement between that person and us. Upon written request of either party any disagreement will be settled by arbitration.

We are not bound by any judgment obtained without our written consent.

WE DO NOT COVER:

- any person occupying or struck by a highway vehicle owned by you or by a relative, other than a covered automobile.
- any person who settles a bodily injury claim without our written consent.
- any claim which would benefit any insurer or self-insurer under any workers compensation, liability benefits or similar law.
- any claim for which benefits are provided under the Personal Injury Protection Coverage of this policy.
- a covered automobile while hired or rented to others for a charge, or any automobile which you are driving while available for hire by the public. However, this exclusion does not apply to shared expense car pools.
- a vehicle while being used without permission of the owner.

LIMITS OF LIABILITY

The limit shown in the Declarations for "each person" is the maximum we will pay to any one person. The limit shown in the Declarations for "each accident" is the maximum we will pay to two or more persons.

REDUCTIONS

We have the right to reduce our payment to any person under this Section by the amount he:

- is entitled to recover from any legally responsible person.
- is paid under a workers compensation or any similar law.
- is paid under the Automobile Medical Expense Coverage Section of this policy.

Any sum paid to an injured person under this Section will reduce any amount such person is legally entitled to collect under the Automobile Liability Coverage Section of this policy.

OTHER INSURANCE

If there is other similar insurance, we will pay only our fair share. The total amount you recover under all policies will be limited to the highest of the applicable limits of liability of this insurance and such other insurance.

Our share is the proportion that our limit bears to the total of all applicable limits. However, if you do not own the automobile, our insurance will be excess over other similar insurance available to the insured. If there is other excess or contingent insurance, we will pay our fair share.

Any insurance under this Section will be excess over any Personal Injury Protection Coverage of this policy.

"uninsured highway vehicle" means:

- A motor vehicle to which no insurance policy or other financial security is applicable at the time of the accident.

- A motor vehicle with respect to which insurance or other financial security covering bodily injury is in effect at the time of the accident, but the amount of bodily injury coverage under such insurance and other financial security is less than the amounts specified by an applicable motor vehicle financial responsibility law, motor vehicle compulsory insurance law, or similar applicable law. For the purposes of this Section, the applicable law shall be the law of the state in which the covered automobile is principally garaged.
- A motor vehicle which has a bodily injury liability bond or insurance policy in effect at the time of the accident, but the company writing such bond or policy denies coverage, or is or becomes insolvent.
- A hit and run highway vehicle which causes bodily injury to an insured as the result of striking such a person or a motor vehicle which he is occupying at the time of the accident, if:
  - The identity of either the driver or owner of such motor vehicle is unknown;
  - The accident must be reported within 24 hours to a police officer, a peace or judicial officer, or the Commissioner or Director of Motor Vehicles;
  - The insured or someone on his behalf files with us within 30 days of the accident a statement, made under oath, that the insured or his legal representative has a cause, or causes, of action due to the accident for damages against a person or persons whose identity is unknown; and
  - the insured or his legal representative makes available for inspection by us, when requested by us, the motor vehicle occupied by the insured at the time of the accident.

Office - Supreme Court, U.S.
FILED
OCT 17 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-447 (2)

IN THE

Supreme Court of the United States

October Term, 1984

METROPOLITAN PROPERTY AND LIABILITY INSURANCE COMPANY,

Petitioner,

vs.

EARL M. LONGENECKER, MARY JANE LONGENECKER, WILLIAM E. BAKER, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and AMERICAN MOTORISTS INSURANCE COMPANY,

Respondents.

TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, AT NO. 81-2867.

BRIEF OPPOSING WRIT OF CERTIORARI

JAMES P. BRADLEY
Attorney for Respondent, American Motorists Ins. Co.
Ten Independence Mall
Sixth & Arch Streets
Sixth Floor
Philadelphia, PA 19107
(215) WA5-5600
Atty. I.D. #18479

ROCCO P. IMPERATRICE, III
CRAMP, D'IORIO, McCONCHIE & FORBES, P.C.
Attorneys for Respondent, State Farm Mutual Automobile Insurance Company
215 N. Olive Street
Media, PA 19063
(215) 565-1700
Atty. I.D. #32181

Batavia Times Publishing Co.
Edward W. Shannon
Philadelphia, Pa. (215) 232-8181

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Questions Presented

I. Did the Third Circuit Court of Appeals properly apply the appropriate standard of review in affirming the District Court's finding that there was no case or controversy in relation to Petitioner's request for declaratory relief?

II. Does a case or controversy exist between Petitioner, an uninsured motorist insurance carrier, and Respondents, automobile liability insurance carriers, to determine coverage questions when the Petitioner has not paid the insured and it is uncertain whether such payment will have to be made?

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IN THE

Supreme Court of the United States

October Term, 1984

No. 84-447

METROPOLITAN PROPERTY AND LIABILITY INSURANCE COMPANY,

Petitioner,

vs.

EARL M. LONGENECKER, MARY JANE LONGENECKER, WILLIAM E. BAKER, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and AMERICAN MOTORISTS INSURANCE COMPANY,

Respondents.

TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, AT NO. 81-2867.

BRIEF OPPOSING WRIT OF CERTIORARI

Opinions Below

The Order and Opinion of the Court of Appeals affirming the District Court's dismissal of the Petitioner's Petition for Declaratory Judgment (App. 16a) is not reported. The Order and Opinion of the United States District Court dismissing the Petition for Declaratory Judgment (App. 10a) is not reported.

Jurisdiction

In accordance with 28 U.S.C. §1254(1), the jurisdiction of the Court is invoked to review upon issuance of a Writ of Certiorari the Third Circuit Court of Appeals' affirmance on June 18, 1984, of the District Court's dismissal of the Petition for Declaratory Judgment by Metropolitan Property & Liability Insurance Company.

Constitutional Provision Involved

"The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of Admiralty and Maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

U.S. CONST. art. III, Sec. 2, cl. 1.

Reasons for Denying Writ

The Third Circuit Court of Appeals has rendered a decision in conformity with the decisions of other Federal Courts of Appeals by dismissing an action that fails to present a case or controversy. Additionally, the Appellate Court followed the accepted and usual course of judicial proceedings by properly applying the appropriate standard of review in affirming the District Court's dismissal of the Petition for Declaratory Relief. Therefore, this Court need not exercise its discretionary power of review under a Writ of Certiorari to ensure uniformity of the law among the various Federal Appellate Courts.

Statement of the Case

This action arises from a Complaint for Declaratory Judgment in which the Petitioner, Metropolitan Property & Liability Insurance Company (hereinafter "Metropolitan"), sought an adjudication as to its rights and obligations under a policy of insurance which Metropolitan issued to Earl and Mary Jane Longenecker. Specifically, the Petitioner sought a declaration from the Court that it is not legally obligated to provide uninsured motorist benefits to the Longeneckers because the alleged uninsured tortfeasor, William E. Baker, is entitled to coverage under either a policy of automobile liability insurance issued by the Respondent, State Farm Mutual Automobile Insurance Company (hereinafter "State Farm"), or under a policy of automobile liability insurance issued by Respondent, American Motorist Insurance Company (hereinafter "American"). Both carriers have denied coverage to Mr. Baker. Metropolitan had made no payments to the Longeneckers relative to their uninsured motorist claim.

On June 14, 1982, the Lower Court granted Respondents' (State Farm and American) Motion for Summary Judgment, per Order of the Hon. Louis C. Bechtle at No. 81-2867 (App. 1a.) Thereafter, Petitioner appealed, the matter being listed as No. 82-1427 with the Court.

Oral argument was heard on January 11, 1983, by Circuit Judges Weis, Sloviter and Becker and, on February 7, 1983, per Memorandum Opinion by Judge Weis (App. 3a), this matter was remanded to the Lower Court "for further proceedings consistent with this Opinion", to wit:

1. the indispensability of one or more of the parties; and

2. justiciability or "ripeness".

As a result of the Memorandum Opinion, an Order was issued on February 14, 1983, by the Lower Court directing the submission of legal memoranda addressing the issues suggested in the Appellate Court's Memorandum Opinion.

On September 27, 1983, a Hearing was held in the lower Court and, subsequent thereto, on October 7, 1983, the Lower Court issued a Memorandum and Order (App. 10a) dismissing the action as not justiciable. Thereafter, Petitioner appealed.

Oral argument was heard on June 11, 1984, by Circuit Judges Weis and Becker and District Judge Oliver. On June 18, 1984, by Memorandum Opinion (App. 16a) from Judge Weis, this dismissal was affirmed.

SUMMARY OF ARGUMENT

I. The Third Circuit Court of Appeals properly applied the appropriate standard of review in affirming the District Court's dismissal of Petitioner's Petition for Declaratory Relief.

As stated in the brief of State Farm and American in the Court below, discretion to implement or dismiss a declaratory remedy is subject to a more certain review then an "abuse of discretion" standard and, while not expressly adopted, the usual practice on appeal is for the appellate court to substitute its own judgment for that of the trial court. *Doe v. Gallinot*, 657 F.2d 1017 (9th Cir. 1981); Wright, Miller & Kane, *Federal Practice and Procedure*, Civil 2d §2759 (1983). Admittedly, the Court below stated, "in view of the circumstances in this case, which we have twice reviewed, we find no abuse of discretion in the District Court's decision to withhold the Declaratory Relief at this time." *Metropolitan Property & Liability Ins. Co. v. Earl M. Longenecker, et al.*, No. 83-1819 (3d Cir. 1984). App. 18a. Respondents admit that the choice of words employed by the Appellate Court may have been unfortunate, to wit, "abuse of discretion". Nevertheless, a careful review of the entire Opinion of the Appellate Court indicates that the Appellate Court did in fact reach the merits of the Trial Court's dismissal of Declaratory Relief and did substitute its judgment for that of the Trial Court. For example:

> Judge Bechtle referred to ambiguous scenarios which are lurking in the background and which may some day mature into a real dispute. *His doubt as to the advisability of granting Declaratory Relief at this stage of the events is quite understandable.* (Emphasis added.)

Metropolitan Property & Liability Ins. Co. v. Earl M. Longenecker, et al., No. 83-1819 (3d Cir. 1984). *See* App. 18a. At the very least, the Appellate Court impliedly accepted and applied the "substitution of discretion" standard.

However, assuming the Appellate Court applied the "abuse of discretion" standard, as contended by the Petitioner, its application of that standard was not erroneous since, as stated above, the "substitution of discretion" standard has not been expressly adopted. Furthermore, if the "abuse of discretion" standard was applied, it was done properly. "An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or illwill, as shown by the evidence or the record, discretion is abused." *Mielcuszny v. Rosol*, 317 Pa. 91, 93-94, 176 A.236, 237 (1934). Since the Appellate Court stated that "[the Lower Court's] doubt as to the advisability of granting declaratory relief at the stage of the events is quite understandable," it is apparent that the Appellate Court did not find the Lower Court's decision a misapplication of the law or manifestly unreasonable or prejudicial and thereby an "abuse of discretion".

As stated above, Petitioner contends that if the "abuse of discretion" standard is the appropriate standard of review, the Appellate Court erroneously applied this standard. However, Petitioner, in support of its contention, fails to address this matter and instead argues the merits of its case, citing the conservation of judicial resources and judicial economy as support for quick resolution of this matter. Additionally, Petitioner fails to mention that if it did not pursue this declaratory

action, the Longeneckers' uninsured and underinsured motorist claims would have been settled long ago either by common law arbitration (as provided in the insurance contract) or compromise.

Petitioner's submission "that a judgment by the Court declaring the respective liabilities of State Farm and American Motorist will ... bring about a quick resolution" is unfounded. If this Court grants declaratory relief, all carriers in the instant situation will delay payments to injured insureds by seeking a declaratory adjudication prior to making payments. This behavior, in turn, will force insureds to protect their rights by filing for uninsured motorist benefits, commencing a tort action against the uninsured motorist and, thereafter, awaiting the outcome of the declaratory judgment action to determine which course to pursue. Additionally, and with all due respect, a panel of arbitrators, appointed under the uninsured motorist provisions, as set forth contractually between the parties, is not bound by any judicial ruling as to insured's versus uninsured's coverage. Therefore, this Court's decision will not resolve the entire matter. In fact, Petitioner's assertions relative to "judicial economy" are little more than illusory.

Accordingly, this Court need not exercise its supervisory powers under a Writ of Certiorari since the Third Circuit Court of Appeals followed the accepted and usual course of judicial proceedings by properly affirming the District Court's dismissal.

II. No case or controversy exists between the parties.

Article III of the Constitution of the United States provides, in part, that the "judicial power" shall extend to all cases and controversies. U.S. CONST. art. III, Sec. 2, cl.1. Implicit in the "case or controversy" requirement of Article III is the issue of "ripeness".

> "If there is no actual case or controversy, then the matter at hand is not justiciable and the Court has no power to grant declaratory relief. A justiciable controversy is to be distinguished from a dispute of a hypothetical or abstract character or one which is merely academic or moot. *The difference is necessarily one of degree.* The basic question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy between parties having 'adverse legal interest, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'" (Citations omitted; emphasis added.)

Metropolitan Property & Liability Ins. Co. v. Earl M. Longenecker, et al., No. 81-2867 (E.D.Pa. Oct 7, 1983), *aff'd*, No. 83-1819 (3d Cir. 1984). App. at 12a-13a.

The Lower Court, in holding that Metropolitan's request for relief was "premature" and therefore not justiciable, stated that, "Metropolitan's conceptual view of its rights to demand a declaration of its rights does not satisfy this Court's constitutional mandate to address itself to actual cases or controversies and not to ambiguous scenarios which are lurking in the background and which may someday mature into a real dispute." *Id.* App. at 13a-14a.

It is well settled that whether to grant the declaratory judgment in a particular case is a matter within the Court's sound discretion. *See Public Service Commission*

et al. v. Wycoff Co., 344 U.S. 237 (1952); *Brillhart v. Excess Insurance Co.*, 316 U.S. 491 (1942) and *Nationwide Mutual Ins. Co. v. Megill et ux.*, 449 F.Supp. 1200 (E.D. Pa. 1978). The instant question, dealing with declaratory relief in uninsured motorist coverage areas is not a novel issue:

> "This Court has on at least two occasions considered the question of a declaratory judgment concerning the interpretation of an uninsured motorist coverage provision in a motor vehicle liability policy containing the above quoted arbitration clauses.[1] *Government Employees Insurance Company v. Keystone Insurance Co.*, 408 F.Supp. 1185 (E.D.Pa. 1975); *State Farm Mutual Insurance Co. v. Shour*, 407 F.Supp. 787 (E.D.Pa. 1975). In these cases, we accepted the guidance of our learned colleague, Judge Luongo, in *Gulf Insurance Company v. American Arbitration Association*, 311 F.Supp. 989 (E.D.Pa. 1970), which was approved by the Third Circuit in *Travelers Insurance Co. v. Davis*, 490 F.2d 536 (3d Cir. 1974) .... In *Travelers*, the Third Circuit affirmed the District Court's dismissal of the insurance company's declaratory judgment action on the grounds that under Pennsylvania law all questions of coverage and recovery were within the jurisdiction of the arbitrator as provided in the arbitration clause of the uninsured motorist provision."

---

[1] "If we and the insured do not agree about the insured's right to recover damages or the amount of damages, the following arbitration procedure will be used:

> After written demand for Arbitration by either party, each party will select a competent and disinterested arbitrator. The two so selected will select a third. If selection of the third arbitrator cannot be agreed upon within thirty days, the insured or the company may request that selection be made by a judge of the court of record in the county and state in which arbitration is pending . . ."

Megill, Supra at 1202.

Megill, Supra at 1202-3. From *Megill* and the authorities cited therein, it is readily apparent that the courts have been reluctant to grant declaratory relief under the instant circumstances.

Petitioner asserts that declaratory relief may be proper when "contingent" liability appears. *See* Petitioner's Petition at p. 13. In support thereof, Petitioner cites *Lumberman's Mutual Casualty Co. v. Borden Co.*, 241 F. Supp. 683 (S.D.N.Y. 1965). *Lumberman's* dealt with several insurors and one insured relative to coverage issues as between those insurors and *their* insured. Apparently, all insurors were in privity with the insured and the request for declaratory relief resulted from an incident, the consequences of which one of the insurors had contractually agreed to defend and indemnify against. In the instant action, all of the insurors are contractually bound to different parties, although, as a result of the circumstances, the interests of American and State Farm are relatively identical, albeit opposite those of the Petitioner, Metropolitan. Therefore, at the very least, it is submitted that the Petitioner has no standing, in and of itself, to maintain the declaratory judgment action at the present time. Petitioner's only potential right to declaratory relief might arise when, as the Appellate Court suggested in its Opinion dated February 7, 1983 in the instant action (App. 3a), William E. Baker is realigned as a Plaintiff since his interests are adverse to State Farm and American and identical to Metropolitan. (Baker's interests are identical to those of Metropolitan since he would seek to eliminate any risk of personal liability by having State Farm and/or American extend coverage. His interests are adverse to those of State Farm and American since both carriers have denied him coverage. *See* American Motorist Company and State Farm Mutual Insurance

Company's Memorandum of Law, *Metropolitan* No. 81-2867, *supra* at App. 19a). However, in the event that Baker is *realigned*, then diversity jurisdiction would be destroyed and the case subject to dismissal since Baker and the Longeneckers are all Pennsylvania residents.

Curiously, immediately preceding Petitioner's argument relative to "contingent" liability, Petitioner asserts and Respondents concur that:

> To be 'ripe for determination' under the Declaratory Judgment Act, a "*disagreement must not be nebulous or contingent but must have taken on fixed and final shape* so that a court can see what legal issues it is deciding, what effect its decision will have on the adversaries and some useful purpose to be achieved in deciding them." *Public Service Commission of Utah v. Wycoff Co.*, 344 U.S. 237, 244 (1952). (Emphasis added.)

Petitioner's Petition at pp. 10-11. Using Petitioner's authority as set forth above, the following analysis is dispositive. It is uncontroverted that:

> (1) counsel for Metropolitan indicated at the September 27, 1983, hearing before the Lower Court that Metropolitan was still in the stage of casual correspondence with its insured, prompting the Court to note that, "the liability dispute between Metropolitan and the Longeneckers *has not even developed to the level of actual negotiation.*" *Metropolitan*, No. 81-2867, *supra* at p. 4 of App. 13a. (Emphasis added.);
>
> (2) the Longeneckers have commenced a state court action against the alleged tortfeasor, Baker, which has not proceeded to judgment nor to assessment of damages; and
>
> (3) relative to an accident which occurred on October 5, 1980, and due, in part, to Metropolitan's commencement of this action, the Longeneckers

> have received no *uninsured motorist benefits nor any other benefits*, excepting, presumably, Pennsylvania No-Fault Personal Injury Protection benefits.

With the above facts in mind, even if the Longeneckers demanded uninsured motorist benefits through arbitration, they may nor may not prevail at said arbitration. In the event the Longeneckers prevail, then, and only then will Metropolitan's subrogation interests arise, but if, and only if, the sum of the Longeneckers' recovery from Metropolitan *plus* from the alleged tortfeasor, Baker (assuming a successful subrogation action), *exceeds* the Longeneckers' loss and is so proven *by Metropolitan. See Walls v. City of Pittsburgh*, 292 Pa. Super. 18, 436 A.2d 698 (1981). Therefore, the Court's ruling on the issue would be advisory if the Longeneckers do not prevail at uninsured motorist arbitration.

Although Petitioner argues that the Longeneckers would, arguably, prevail, Petitioner supplied the Lower Court no demonstrable evidence of a sufficiently ripe case or controversy in this case. Petitioner states:

> The Longeneckers have already brought suit against William Baker and have made a demand for Uninsured Motorist Arbitration. The Respondent insurance carriers have refused to defend William Baker. Thus, it is clear that there is a sufficient controversy which is ripe for relief.

Petitioner's Petition at p. 10.

Respondents, State Farm and American, admit the *facts* set forth above but respectfully submit that the conclusion drawn from those facts by Petitioner, to wit, "a sufficient controversy . . ." does not logically follow. The Longeneckers requested Uninsured Motorist

Arbitration over two years ago. However, as of this date, neither they nor the Petitioner have pursued this course of action beyond a mere request. Instead, the Petitioner would have the Court determine whether either of the Respondent carriers owed coverage to the tortfeasor and, assuming *arguendo* that the Court decided this issue, then either one of the three carriers would be forced to pay certain sums (to be established in the future) if and when the Longeneckers pursue their claim. The Lower Court determined that the establishment of "certain sums" (to be established in the future) if and when the Longeneckers pursue their claim, " 'simply did not rise to the realm of sufficient immediacy and reality to warrant the issuance of a declaratory judgment'." *Metropolitan Property & Liability Insurance Co. v. Earl M. Longenecker, et al.*, No. 81-2867, *supra*, quoting *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941).

Additionally, Petitioner has not suggested how similar matters would be resolved where the immediacy of the uninsured motorist action is not "certain" or where the liability question is not so "clear". Nor has Petitioner suggested a remedy for the inordinate delay occasioned by the commencement of similar declaratory relief actions where insured victims of uninsured tortfeasors await the outcome of complex litigation commenced by their own insurance carrier.

In *M&M Transportation Co. v. U.S. Industries, Inc.*, 416 F.Supp. 865 (S.D.N.Y. 1976), the Court stated:

> "However troublesome the concept of justiciability may be in its application to some cases, the prematurity of the issue presented in the instant action is clear enough. In essence, the Court

> is herein asked to declare the parties' rights to an "asset" that does not presently exist and whose future existence is not a certainty. To be sure, Plaintiff may be pregnant with confidence that the subject refund eventually will be allowed. That condition, however, is not enough to permit, in effect, a decree of custody over what is now no more than an expectancy that might never be realized. This Court cannot ignore the often-recited admonition that "it is not the function of a United States District Court to sit in judgment on these nice and intriguing questions which today may readily be imagined, but never in fact come to pass." *American Fidelity & Casualty Co. v. Pennsylvania Threshermen and Farmers Mutual Casualty Insurance Co.*, 280 F.2d 453, 461 (5th Cir. 1960). *Cf. Brown & Root, Inc. v. Big Rock Corp.*, 383 F.2d 662, 665-66 (5th Cir. 1967); *Johnson v. Interstate Transit Lines*, 163 F.2d 125, 128-29 (10th Cir. 1947). (Footnote omitted.)

M&M Transportation Co., supra at 870. It is respectfully submitted that Petitioner's cause may be similarly characterized and, therefore, was properly dismissed by the Court below.

Conclusion

The Respondents respectfully request the Court to deny Metropolitan Property & Liability Insurance Company's Petition for a Writ of Certiorari because the Appellate Court followed the accepted and usual course of judicial proceedings by properly applying the appropriate standard of review and conformed with other Federal Appellate and District Courts by affirming the dismissal of Metropolitan's Petition for Declaratory Relief which fails to state a case or controversy.

Respectfully submitted,

JAMES P. BRADLEY
Attorney for Respondent
American Motorists Ins. Co.

ROCCO P. IMPERATRICE, III
Attorney for Respondent
State Farm Mutual Auto. Ins. Co.

APPENDIX

Order Dated June 14, 1982.

IN THE UNITED STATES DISTRICT COURT

For the Eastern District of Pennsylvania

METROPOLITAN PROPERTY AND LIABILITY INSURANCE CO.,

v.

EARL M. LONGENECKER and MARY JANE LONGENECKER and WILLIAM E. BAKER and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and AMERICAN MOTORISTS INSURANCE COMPANY.

Civil Action No. 81-2867

ORDER

AND NOW, TO WIT, this 14th day of June, 1982, upon consideration of the motion of defendants American Motorists Insurance Co., which has been joined in by defendants State Farm Mutual Automobile Insurance Co., Earl M. Longenecker and Mary Jane Longenecker, and also upon consideration of plaintiff's memorandum of law in answer to defendants' motion and plaintiff's reply memorandum, IT IS [illegible]ERED as follows:

Appendix—Order Dated June 14, 1982.

1. Defendants' motion for summary judgment is *granted* on the ground that disputed issues of fact like those involved here must be resolved by arbitration; *Grange Mutual Casualty Co. v. Pennsylvania Manufacturers' Association Insurance Co.*, 438 Pa. 95, 263 A.2d 732 (1970); *National Grange Mutual Insurance Co. v. Kuhn*, 428 Pa. 179, 236 A.2d 758 (1968);

2. Judgment is *entered* in favor of defendants Earl M. Longenecker, Mary Jane Longenecker, William E. Baker, State Farm Mutual Automobile Insurance Company and American Motorists Insurance Company, and against plaintiff Metropolitan Property and Liability Insurance Company.

LOUIS C. BECHTLE, *J.*

Memorandum Opinion Dated February 7, 1983.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 82-1427

METROPOLITAN PROPERTY AND LIABILITY INSURANCE COMPANY,

Appellant,

v.

EARL M. LONGENECKER, MARY JANE LONGENECKER, WILLIAM E. BAKER, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, AMERICAN MOTORISTS INSURANCE COMPANY,

Appellees.

Appeal from the United States District Court
for the Eastern District of Pennsylvania

(D.C. Civil No. 81-2867)

Argued January 11, 1983
Before: WEIS, SLOVITER and BECKER,
Circuit Judges.
(Opinion filed February 7, 1983)

Appendix—Memorandum Opinion Dated February 7, 1983.

Allan C. Molotsky, Esq. (ARGUED)
Stanley P. Stahl, Esquire
Post & Schell, P.C.
210 East Washington Square
Philadelphia, PA 19106

Attorneys for Appellant

James P. Bradley, Esq. (ARGUED)
Suite 620, 841 Chestnut Street
Philadelphia, PA 19107

Attorney for Appellee American Motorists Insurance Company

Rocco P. Imperatrice, III, Esquire
Cramp, D'Iorio, McConchie & Forbes, P.C.
215 N. Olive Street
Media, Pennsylvania 19063

Attorneys for Appellee State Farm Mutual Insurance Company

Dusan Bratic, Esquire
No. 4 U.S. Route 15, North
Dillsburg, PA 17019

Attorney for Appellees, Earl M. and Mary Jane Longenecker

MEMORANDUM OPINION

Appendix—Memorandum Opinion Dated February 7, 1983.

WEIS, *Circuit Judge.*

In this diversity case, the plaintiff, Metropolitan Property and Liability Insurance Company, seeks a declaratory judgment establishing whether automobile liability insurance coverage was in effect for William E. Baker on October 5, 1980. On that day, Baker was driving an automobile that collided with one operated by Earl Longenecker. As result of the accident, Earl and his wife, Mary Jane, sustained personal injuries.

The plaintiff's policy provided uninsured motorist coverage for the Longeneckers. According to the Longeneckers' brief,[1] their policy defines an uninsured motor vehicle as one whose liability insurance carrier "denies coverage." The Metropolitan policy also states that "[i]f we and any person do not agree about that person's right to recover damages, or the amount of damages," the dispute is to be arbitrated. The State Farm Mutual Automobile Insurance Company and the American Motorists Insurance Company have both formally denied coverage on the automobile Baker was driving at the time of the accident.

Metropolitan's complaint listed Baker, the Longeneckers, State Farm, and American Motorists as defendants. Baker and the Longeneckers are citizens of Pennsylvania, and the three insurance companies are citizens of different states. Thus, as filed, the complaint states the complete diversity required for jurisdiction.

---

[1] Even though the plaintiff seeks a declaration of its obligations under its own policy, it did not attach a copy of the policy to its complaint. That deficiency should be corrected on remand.

Metropolitan asked the court to declare that State Farm and American Motorists offered coverage to Baker, that Metropolitan's uninsured motorist coverage is not applicable, and that the Longeneckers be prohibited from pursuing any action against Metropolitan until the respective coverage questions are resolved. The district court granted summary judgment for the defendants on the ground that state law requires disputed issues of fact, like those present in this case, to be resolved by arbitration. The court did not discuss the fact that the arbitration clause applies only as between the Longeneckers and the Metropolitan, and not to the other two insurance companies.[2]

We do not pass on the merits of the district court's decision because we are met by jurisdictional problems at the outset. In determining whether diversity jurisdiction exists, the plaintiff's designation of parties as defendants is not binding, and the court may realign them to conform with their actual interests. The test is whether the parties with the same ultimate interests are on the same side. *See* 13 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §3607, at 641 (1975).

Metropolitan seeks to relieve itself from liability under its uninsured motorist clauses by establishing that Baker was covered by either or both State Farm and American

[2] The parties have cited the case of Grange Mutual Casualty Co. v. Pennsylvania Manufacturers' Association Insurance Co., 438 Pa. 95, 263 A.2d 732 (1970), as authoritative Pennsylvania law on the issue of arbitration. We point out once again that an opinion, as in that case, joined in by less than a majority of the court has no precedential value. *See* Vargus v. Pitman Manufacturing Co., 675 F.2d 73 (3d Cir. 1982).

Motorists. The latter two insurance companies are therefore properly listed as defendants. But, by trying to establish coverage for Baker, Metropolitan is directly serving his interest, or at least it would appear so as we read the record at this point. Consequently, it would seem that Baker should properly be designated as a plaintiff.

Just where the Longeneckers' interest lies is not apparent from the record. They have instituted a tort claim in the state court against Baker, and, in that context, seemingly would be benefited by a finding that the defendant companies did insure him. All, however, may not be what it seems. The Metropolitan uninsured motorist section, as we read it, also includes underinsured coverage. Therefore, depending on the severity of their injuries and the respective limits of the applicable policies, the Longeneckers may fare equally well whether Baker is uninsured or insured.

Adding to the Longeneckers' equivocal posture is the likelihood that their right to recover from Metropolitan has already been established by the mere fact that State Farm and American Motorists denied coverage to Baker, regardless of the justification for their position.[3] *See St. Paul Mercury Insurance Co. v. American Arbitration Association*, 425 Pa. 548, 229 A.2d 858 (1967). This situation suggests an adverse interest between Metropolitan and the Longeneckers, and on that basis they may properly be listed as defendants.

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[3] The Longenecker's counsel requested arbitration in a letter to Metropolitan's counsel dated May 28, 1982. Apparently, however, nothing has occurred since that time.

If Baker is realigned as a plaintiff and the Longeneckers remain as defendants, diversity of jurisdiction will be destroyed. At oral argument, counsel for Metropolitan sought to resolve the problem by dismissing Baker since he has not filed an answer nor appeared by counsel. An appellate court may dismiss a nonadverse party if necessary to preserve diversity jurisdiction. *Ross v. International Brotherhood of Electrical Workers*, 634 F.2d 453, 456 (9th Cir. 1980).

The question remains, however, whether Baker is an indispensable party within the meaning of Fed. R. Civ. P. 19(b). If he is, he may not be dropped as a party to preserve jurisdiction. *See Publicker Industries v. Roman Ceramics*, 603 F.2d 1065, 1069 (3d Cir. 1969); 3 J. MOORE'S FEDERAL PRACTICE ¶19.03.01 at 19-53 (1982). At least superficially, the relationship between Baker and the defendant insurance companies would appear to require his presence in the litigation. Because the question of indispensability may require some fact finding and because of the ambiguous position of the Longeneckers, we conclude that the jurisdictional issue should first be addressed by the district court.

One additional matter should also be determined on remand—that is, whether Metropolitan has an actual dispute with the State Farm and American Motorist insurance companies at this time. If Metropolitan had paid the Longeneckers and became subrogated to their interests, the controversy would be a live one. Until Metropolitan has made a payment, however, there is some question whether it has only a potential and contingent obligation, and not a definite and concrete

dispute as will satisfy the case or controversy requirement. *Cf. ACandS, Inc. v. Aetna Casualty Co.*, 666 F.2d 819 (3d Cir. 1981). We do not pass upon the issue here.

Accordingly, this case will be remanded to the district court for further proceedings consistent with this opinion.

TO THE CLERK:

Please file the foregoing opinion.

Circuit Judge

Memorandum and Order Dated October 7, 1983.

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Pennsylvania
Entered 10-7-83
Clerk of Court

Civil Action No. 81-2867.

METROPOLITAN PROPERTY & LIABILITY INSURANCE COMPANY,

vs.

EARL M. LONGENECKER, MARY JANE LONGENECKER, WILLIAM E. BAKER, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and AMERICAN MOTORISTS INSURANCE COMPANY.

MEMORANDUM AND ORDER

BECHTLE, *J.* OCTOBER 7, 1983

This is a diversity action for declaratory judgment by Metropolitan Property and Liability Insurance Company which seeks to establish whether automobile liability insurance coverage was in effect for the driver of an automobile which collided with one operated by the insurance company's insureds, Earl and Mary Jane Longenecker. This Court previously granted summary judgment for the defendants based on an arbitration clause in the insurance contract between Metropolitan

and the Longeneckers. This Memorandum follows an appeal of that decision by Metropolitan and a remand of the case by the Third Circuit for further proceedings consistent with its opinion.

The case arises from an automobile collision which occurred on October 5, 1980, between a car driven by William Baker and one driven by Earl Longenecker. As a result of the accident both Earl Longenecker and his wife, Mary Jane Longenecker, sustained personal injuries.

The Longeneckers were insured by Metropolitan under a policy providing both uninsured and underinsured motorist coverage. The Metropolitan policy definition of an uninsured vehicle includes vehicles which have a policy in effect at the time of the accident but the carrier denies coverage. The Metropolitan policy also provides for arbitration of the uninsured motorist provision if there is a disagreement as to any person's right to collect damages under that provision or the amount of damages. Both State Farm Mutual Automobile Insurance Company and American Motorists Insurance Company have denied coverage on the automobile Baker was driving. State Farm is the insurer of Eugene Thomas, the owner of the vehicle driven by Baker. American Motorists is the insurer of Dale Sprenkle, the step-father of Baker with whom Baker resided as a minor at the time of the accident.

In bringing this diversity action, Metropolitan sought a declaration of its obligations under its own policy given the possible existence of coverage on behalf of Baker under either the State Farm or the American Motorists

policies. Metropolitan's complaint named Baker, the Longeneckers, State Farm and American Motorists as defendants. The three insurance companies are citizens of different states and Baker and the Longeneckers are citizens of Pennsylvania. Facially at least, the requirements of diversity were met. However, upon review of this Court's grant of summary judgment for defendants due to the arbitration clause, the Third Circuit indicated that a jurisdictionally defeating realignment of the parties might be warranted in view of their actual interests. Remand was ordered to resolve this issue and the resulting question of the indispensability of certain parties whose presence would defeat jurisdiction if a realignment occurred. In addition, this Court was directed to determine whether Metropolitan had actually made any payment to the Longeneckers so that it had become subrogated to their interests. If not, the existence of a definite and concrete dispute as would satisfy the Article III case or controversy requirement would be subject to doubt.

Initially, attention must be given to the case or controversy issue since Metropolitan admitted in a hearing held in open Court on September 27, 1983, that Metropolitan had made no payment to the Longeneckers. If there is no actual case or controversy, then the matter at hand is not justiciable and the Court has no power to grant declaratory relief. *Maryland Casualty Co. v. Pacific Coal and Oil Co.*, 312 U.S. 270, 273 (1941). A justiciable controversy is to be distinguished from a dispute of a hypothetical or abstract character or one which is merely academic or moot. *ACandS, Inc. v. Aetna Cas. & Sur. Co.*, 666 F.2d 819 (3d Cir. 1981). The difference is

necessarily one of degree. The basic question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy between parties having "adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co. v. Pacific Coal & Oil Co., supra,* 312 U.S. at 273.

Applying these principles to the facts at hand, this Court concludes that there is no case or controversy in existence between Metropolitan and the other two insurance companies, State Farm and American Motorists, at this time. Metropolitan has taken the position that as there is no doubt that it will have to pay the Longeneckers on their claim, there is no doubt that there *will be* an indemnification claim by Metropolitan against State Farm and American Motorists and this is sufficient for declaratory judgment purposes. The fact still exists, however, that to date no payment has been made to the Longeneckers by Metropolitan. Moreover, while the position of Metropolitan might have been persuasive if its payment to the Longeneckers were imminent, counsel for Metropolitan indicated at the September 27, 1983 hearing that the carrier is still in the stage of casual correspondence with its insured as to the amount of their damages. The liability dispute between Metropolitan and the Longeneckers has not even developed to the level of actual negotiation. As such, Metropolitan's future claim for indemnification from either State Farm or American Motorists or both is not of "sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Metropolitan's conceptual view of its right to demand a declaration of

its rights does not satisfy this Court's constitutional mandate to address itself to actual cases or controversies and not to ambiguous scenarios which are lurking in the background and which may someday mature into a real dispute. At present, Metropolitan's request for declaratory relief is premature. Accordingly, the case shall be dismissed as not justiciable.

An appropriate Order will be entered.

Appendix—Memorandum and Order Dated October 7, 1983.

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Pennsylvania

Civil Action No. 81-2867.

METROPOLITAN PROPERTY & LIABILITY INSURANCE COMPANY,

vs.

EARL M. LONGENECKER, MARY JANE LONGENECKER, WILLIAM E. BAKER, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and AMERICAN MOTORISTS INSURANCE COMPANY.

ORDER

AND NOW, TO WIT, this 7th day of October, 1983, for the reasons stated in the foregoing Memorandum, IT IS ORDERED that the suit is *dismissed.*

LOUIS C. BECHTLE, *J.*

Memorandum Opinion of the Court Dated June 18, 1984.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 83-1819

METROPOLITAN PROPERTY & LIABILITY INSURANCE COMPANY,

Appellant.

v.

EARL M. LONGENECKER; MARY JANE LONGENECKER; WILLIAM E. BAKER; STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and AMERICAN MOTORISTS INSURANCE COMPANY.

Appeal from the United States District Court for the Eastern District of Pennsylvania

(D.C. Civil No. 81-2867)

District Judge: Honorable Louis C. Bechtle

Argued June 11, 1984
Before: WEIS and BECKER, *Circuit Judges*, and OLIVER, *District Judge*.*

Filed June 18, 1984

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* The Honorable John W. Oliver, United States District Judge for the Western District of Missouri, sitting by designation.

Appendix—Memorandum Opinion of the Court Dated June 18, 1984.

MEMORANDUM OPINION OF THE COURT

WEIS, *Circuit Judge.*

This is the second time that plaintiff has taken an appeal to the court in this case. On the first occasion, we remanded to the district court for determinations on whether diversity jurisdiction is present and whether an actual dispute exists between plaintiff Metropolitan and the other two insurance companies, State Farm and American Motorists.

After further briefing and argument, the district court concluded there was no existing case or controversy, noting particularly that Metropolitan had not yet made any payment to its insureds, the Longeneckers. Indeed, the court said that Metropolitan is "still in the stage of casual correspondence with its insured as to the amount of their damages." The liability dispute between them "has not even developed to the level of actual negotiation." We note that the accident occurred on October 5, 1980, more than three years ago.

The district court concluded that Metropolitan's future claim for indemnification from State Farm or American Motorists was not of sufficient immediacy to warrant the issuance of a declaratory judgment. The court said, "Metropolitan's request for declaratory relief is premature." Accordingly, the case was dismissed.

As we pointed out in our first opinion, the Longenecker's counsel had requested arbitration on their uninsured and underinsured claim with Metropolitan in a letter dated May 28, 1982. Seemingly, nothing has been accomplished in that direction although more than two years have gone by. We noted also that it is possible

that the Longeneckers have no real interest in whether Baker was insured because their own policy may perhaps be adequate.

The grant of a declaratory judgment is a discretionary matter for the district court. 28 U.S.C. §2201; *see Interdynamics, Inc. v. Wolf*, 698 F.2d 157, 167 (3d Cir. 1982); *Exxon Corp. v. Federal Trade Commission*, 588 F.2d 895, 900 (3d Cir. 1978); *Bituminous Coal Operator's Assn. v. International Union, United Mine Workers*, 585 F.2d 586, 596 (3d Cir. 1978). Judge Bechtle referred to the "ambiguous scenarios which are lurking in the background and which may some day mature into a real dispute." His doubt as to the advisability of granting declaratory relief at this stage of the events is quite understandable.

In view of the circumstances in this case, which we have twice reviewed, we find no abuse of discretion in the district court's decision to withhold declaratory relief at this time.

Accordingly, the order of the district court will be affirmed.

TO THE CLERK:

Please file the foregoing opinion.

WEIS

Circuit Judge

American Motorists Insurance Company and State Farm Mutual Automobile Insurance Company's Memorandum of Law.

JAMES P. BRADLEY, ESQUIRE
Attorney I.D. #18479
Suite 620—841 Chestnut Street
Philadelphia, Pa. 19107
(215) WA5-5600

IN THE UNITED STATES DISTRICT COURT

For the Eastern District of Pennsylvania

METROPOLITAN PROPERTY & LIABILITY INSURANCE COMPANY,

vs.

EARL M. LONGENECKER, MARY JANE LONGENECKER, WILLIAM E. BAKER, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY and AMERICAN MOTORISTS INSURANCE COMPANY.

Civil Action No. 81-2867

AMERICAN MOTORISTS INSURANCE COMPANY AND STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY'S MEMORANDUM OF LAW

This action arises out of a vehicular accident wherein a vehicle driven by WILLIAM E. BAKER collided with a vehicle operated by EARL LONGENECKER. As a

result of the accident, EARL and his wife, MARY JANE, sustained personal injuries. METROPOLITAN PROPERTY & LIABILITY INSURANCE COMPANY (hereinafter "Metropolitan"), insured the vehicle driven by the LONGENECKERS and the METROPOLITAN policy provided uninsurance motorist coverage for the LONGENECKERS. The METROPOLITAN uninsured motorist section also includes underinsurance coverage.

WILLIAM E. BAKER has been formally denied coverage by both STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY (hereinafter "State Farm"), and AMERICAN MOTORISTS INSURANCE COMPANY (hereinafter "AMERICAN").

The respective parties' interest in the instant litigation is as follows:

METROPOLITAN, as the carrier for the LONGENECKERS, seeks to have coverage established for BAKER so that METROPOLITAN may escape its responsibility under its uninsured motorist coverage of the LONGENECKERS. Obviously, METROPOLITAN'S interest in establishing coverage with regard to Baker is adverse to STATE FARM and AMERICAN. In an effort to avoid personal liability, BAKER would, similarly, desire that coverage be established as to either STATE FARM or AMERICAN or both. Therefore, BAKER'S interest is identical to METROPOLITAN'S interest in the instant litigation and, consequently, it would appear that BAKER should be realigned as a Plaintiff.

Appendix—American Motorists Insurance Company and State Farm Mutual Automobile Insurance Company's Memorandum of Law.

The facts of this action are substantially identical to those found in *Mission Insurance Co. v. Mackey*, 340 F. Supp. 824 (W.D. Mo., 1971). This was a declaratory judgment action in which one of the individual Defendants made demand upon two (2) insurors to defend him in a negligence action brought against him in a State Court by other individual Defendants. The action was dismissed by the District Court for lack of diversity jurisdiction since it appeared that both insurors were seeking to prove the same fact, *viz.*, that the allegedly negligent Defendant did not have permission to operate his parents' automobile at the time of the accident in question. Likewise, in *Bonnell v. General Accident Fire & Life Assurance Company*, 167 F. Supp. 384 (N.D. Ca., 1958) the Plaintiff sued his insuror and a third party in a declaratory judgment action to test the validity of the insuror's denial of coverage. The third party had sued Plaintiff in State Court for damages and the insuror refused to defend the Plaintiff. The Court held that the interests of the Plaintiff and the third party were the same in that both were seeking to have the insuror's denial of coverage declared invalid. The Court therefore proceeded to realign the parties and dismiss the case for lack of diversity jurisdiction since both the Plaintiff and the third party Defendant were residents of California. Lastly, the LONGENECKERS' counsel concedes that the interests of his clients are identical with the Defendant insurors (See Exhibit "A").

The Defendants therefore respectfully submit that Defendant WILLIAM E. BAKER should be aligned as a Plaintiff and action dismissed for lack of diversity jurisdiction.

II. WILLIAM E. BAKER IS AN INDISPENSABLE PARTY IN THE PRESENT LITIGATION.

In the event of a realignment, this Court must consider whether BAKER is an indispensable party. Federal Rule of Civil Procedure 19(b) provides, in pertinent part, that the factors to be considered by the Court relative to the indispensable nature of a party include:

> (F)irst, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for non-joinder.

Since BAKER and the LONGENECKERS are all residents of the Commonwealth of Pennsylvania, the realignment of parties will deprive this Court of jurisdiction over the subject matter as contemplated by Federal Rule of Civil Procedure 19(a). With regard to BAKER'S position in this action, the following facts are (or should be) undisputed:

1. BAKER'S interest is clearly adverse to that of the LONGENECKERS, STATE FARM and AMERICAN.

2. BAKER'S interest is identical to the interest of METROPOLITAN insofar as BAKER seeks coverage from STATE FARM and AMERICAN. However,

BAKER is seeking to eliminate the risk of personal liability while METROPOLITAN is seeking to avoid liability under its policy to the LONGENECKERS.

If BAKER is dismissed from the instant action, how can METROPOLITAN, *sua sponte*, assert BAKER'S purported rights against STATE FARM and AMERICAN? If BAKER were dismissed from the instant action and METROPOLITAN were to fail in its efforts to establish coverage for BAKER, would BAKER be precluded from asserting his rights in yet another action against STATE FARM and AMERICAN (especially considering that METROPOLITAN incurred some real liability on behalf of its insureds, the LONGENECKERS?) It is respectfully submitted that the answer to the first query is that, without BAKER, METROPOLITAN cannot seek to exercise BAKER'S alleged right to coverage. The answer to the second query is, simply, "no", and, therefore, STATE FARM and AMERICAN would be forced to litigate the identical issue before this Court *ab initio*.

Returning to the test as to whether BAKER is an indispensable party or not, it is evident that:

1. The dismissal of BAKER would be prejudicial to AMERICAN and STATE FARM in that BAKER would be able to re-litigate the identical issue involved in the instant action in the event that METROPOLITAN were unsuccessful in establishing coverage;

2. It is respectfully submitted that no protective provision, shaping of relief or other measures could alleviate the above-referenced prejudice;

3. It is doubtful that a judgment rendered by this Court will have any bearing on a potential Arbitration Hearing between the LONGENECKERS and METROPOLITAN and, further, an adverse judgment as to METROPOLITAN will be wholly inadequate if BAKER is dismissed as a party in view of BAKER's right to re-litigate; and

4. Lastly, and perhaps of the most practical import, the Plaintiff, METROPOLITAN will certainly have an adequate remedy if this action is dismissed for non-joinder since, once it incurs actual liability it may enforce its rights against BAKER and/or STATE FARM and AMERICAN in state Court.

Plaintiff places great reliance upon *Provident Tradesman Bank & Trust Co. v. Patterson*, 88 S. Ct. 733, 390 U.S. 102, 19 L. Ed. 2d 936 (1968), to support its contentions that WILLIAM BAKER is not an indispensable party to the present litigation. Defendants respectfully submit that the similarities between the two cases are superficial at best. The major distinction between the two cases lies in the fact that in *Provident* the Plaintiff had litigated the case to a verdict. The Supreme Court noted that:

> "Plaintiff's interest in preserving the fully litigated judgment should be overborne only by rather greater opposing considerations than would have been required at an earlier stage when their only concern would have been for a federal rather than a state forum".

In *Diamond Shamrock Corp. v. Lumbermens Mutual Casualty Co.*, 416 F. 2d 707 (C.A. 7, 1969), the Court emphasized the necessity of having all parties with an actual interest being before the Court stating (at p. 709),

> "... all parties who have an interest in or could be affected by the outcome of the declaratory judgment action here have been joined. *The distinction is critical.* (Emphasis supplied).

To proceed in the absence of WILLIAM BAKER as Plaintiff demands would be essentially a request for an advisory opinion inasmuch as MR. BAKER would not be bound by any ruling in which he was not a party.

Defendants therefore submit that WILLIAM BAKER is an indispensable party within the meaning of Federal Rule of Civil Procedure 19(b) and as such, should remain a party litigant.

III. THE PLAINTIFF HAS NO STANDING TO MAINTAIN A DECLARATORY JUDGMENT AGAINST THE DEFENDANT INSURORS AT THE PRESENT TIME.

There is no requirement that an insuror make an actual payment in order to secure a declaration of its rights under its policy. The Plaintiff insuror in this case is not however seeking a declaration of the rights and liabilities under the policy which it issued to the LONGENECKERS. It is seeking to have the Court declare that the disclaimers of coverage issued by STATE FARM and AMERICAN under their respective policies of insurance to be invalid. Very simply put, the

Plaintiff has no present or prospective interest in these policies and is therefore not in a position to claim that an adverse interest exists between itself and the two insuror Defendants.

Plaintiff advises the Court that "it is inevitable that (it) will have to pay money out of its insured. The contingency of payment to the LONGENECKERS is not at all remote".

This statement overlooks a vitally important consideration, *i.e.*, Plaintiff has brought this suit for the sole purpose of avoiding payment of uninsured motorist benefits to the LONGENECKERS. Plaintiff in fact freely admits in its most recent Brief that "A declaration of their (Defendant insurors) would, in effect, be a declaration of Plaintiff's non liability and vice-versa". (Plaintiff's Brief at p. 4).

Moreover, even if Plaintiff would recognize its obligations to make payment of uninsured motorist benefits and enter into a settlement agreement with the LONGENECKERS, it does not automatically follow that the Plaintiff would acquire a judicially cognizable interest in the policies of the Defendant insurors. In order to acquire such an interest it would have to be established the uninsured motorist policy limits in the METROPOLITAN policy were sufficient to fully compensate the LONGENECKERS for the injuries that they sustained as a result of the accident in question. See *Walls v. City of Pittsburgh*, 292 Pa. Super. 18, 436 A2d 698 (1981). *Shamey v. State Farm Mutual Automobile Insurance Co.*, 229 Pa. Super. 215, 331 A2d 498 (1974).

Appendix—American Motorists Insurance Company and State Farm Mutual Automobile Insurance Company's Memorandum of Law.

Defendants submit that there is no way for this Court to determine whether the Plaintiff will acquire an interest in the matter absent an actual uninsured motorist Arbitration Hearing, which is precisely what the LONGENECKERS have been attempting to secure from the outset of this litigation. The only alternative to such hearing would be for the Court to hold a full scale trial on the issues of liability and damages arising from the underlying automobile accident so that it can assess the likelihood of METROPOLITAN'S prospective subrogation rights. This hardly seems consonant with the principal of judicial economy which Plaintiff so fervently espouses.

The cases cited by Plaintiff in support of its argument that the present controversy is ripe for adjudication are readily distinguishable from the facts of the instant litigation. *Lumbermens Mutual Casualty Co. v. Borden Co.*, 241 F. Supp. 683 (S.D.N.Y. 1965), *Diamond Shamrock v. Lumbermens Mutual Casualty Co.*, 416 F2d 707 (C.A. 7, 1969). *A Cand S v. Aetna Casualty & Surety Co.*, 666 F2d 819 (C.A. 3, 1981), involved suits between insurors with mutual policyholders to determine which insuror had the primary obligation to indemnify and defend the policyholder in an existing lawsuit. In the case at bar, all three insurors have different policyholders and it cannot be fairly stated that the task before the Court is to determine which of the three policies is primary.

According to Plaintiff, the right of an insurer to be immune from claims under a policy of insurance is a "right" which the insurer may have declared under the

Declaratory Judgment Act, provided a valid "controversy" exists as to the insured's liability citing. *Maryland Casualty Co. v. Havens*, 24 F. Supp. 460, 461 (M.D. Pa. 1938). This general statement of law ignores the fact that the underlying controversy arises from an uninsured motorist action and that there does exist within the Plaintiff's policy of insurance a clause mandating that such disputes be resolved by Arbitration. Defendants submit that it is something more than a coincidence that the Third Circuit Opinion made reference to the case of *St. Paul Mercury Insurance Company v. American Arbitration Association*, 425 Pa. 548, 229 A2d 858 (1967). In this case, the insuror, as does the Plaintiff here, sought to avoid Arbitration under the uninsured motorist clause of its policy by contending that the alleged tortfeasor was not actually "uninsured" because his carrier had wrongfully denied coverage. The Court refused to enjoin the Arbitration stating (at p. 553), that:

> "To hold otherwise, would present a clear inconsistency and would prevent the prosecution of rights contracted for by the insured with the Plaintiff".

There is no practical difference between the procedure employed by the Plaintiff in the present action and the procedure which was proscribed in the *St. Paul* case. The Pennsylvania Courts have made it abundantly clear that they will not permit an insuror to escape its contractual obligations to arbitrate uninsured motorist claims. Cases which so hold include *Hartford Insurance Group v. Kessler*, 227 Pa. Super. 47, 324 A2d 521 (1974), *Gordon*

v. Keystone Insurance Co., 277 Pa. Super. 198, 419 A2d 730 (1980), *Wilbert v. Harleysville Mutual Insurance Co.*, 254 Pa. Super. 217, 385 A2d 987 (1978). *Allstate Insurance Co. v. McGonagle*, 449 Pa. 362, 296 A2d 738 (1972), to name but a few.

In conclusion, Defendants respectfully submit that until such time as the Plaintiff actually pays its policyholder it does not have an actual dispute with them so as to satisfy the case or controversy requirement.

IV. STATUS OF UNINSURED MOTORIST ARBITRATION.

It is conceded by all parties that the uninsured motorist Arbitration which the LONGENECKERS have been seeking for almost one (1) year will not decide the question of coverage which the Plaintiff has attempted to raise. Defendants contend however that this factor should be weighed in the context of the Plaintiff's contractual obligations to the LONGENECKERS, who have an absolute right to proceed with such a hearing. In *Nationwide Mutual Insurance Co. v. Megill*, 449 F. Supp. 1200 (E.D. Pa., 1978), it was held that an insuror could not utilize a declaratory judgment proceeding to avoid its obligation to arbitrate disputes arising from uninsured motorist claims. After an extensive review of case law on the subject, the Court stated (at p. 1203):

> "These cases rest, not upon the non-availability of a Declaratory Judgment as an alternative remedy, but upon the exclusion, by agreement of Court proceeding as a vehicle for the resolution of

> disputes. To permit a Declaratory Judgment proceeding would render the parties' agreement to Arbitrate disputes nugatory (citations omitted).

Moreover, as previously noted unless the Plaintiff actually makes a payment it does not have any interest in the coverage of either American Motorist or State Farm.

Plaintiffs complain however that an Order to proceed to Arbitration would be a waste of judicial economy such as would be frowned upon by the Supreme Court in *Provident Tradesman Bank, supra.* The argument is defective for several reasons. Uninsured motorist arbitration would not involve the Court and would afford the LONGENECKERS the benefits they had contracted for with the Plaintiff. Although an uninsured motorist hearing would not resolve the question of coverage, it should also be noted that the Declaratory Judgment requested by the Plaintiff would not resolve the issue of damages and a second proceeding will be necessary irrespective of this Court's determination.

The task of resolving all of the issues arising from this litigation is not nearly as gargantuan as Plaintiff would have the Court believe. The LONGENECKERS presently have a tort claim pending against MR. BAKER in State Court. No appearance has been entered by MR. BAKER in this action. The LONGENECKERS are free to enter judgment against MR. BAKER and proceed with an assessment of damages. They are

understandably reluctant to do so since there is a serious question as to MR. BAKER'S insurance coverage. Quite properly, they have advised Plaintiff of their desire to proceed under their uninsured motorist coverage. Were the Plaintiff to abandon its refusal to honor the LONGENECKERS' claim, it could perfect a default against MR. BAKER, assess damages and contest the disclaimers of AMERICAN MOTORIST and STATE FARM by garnishment. Such a procedure would undoubtedly be the most expeditious manner in which to proceed. It would guarantee prompt payment to the LONGENECKERS and guarantee that all issues are resolved in a single Court proceeding.

Appendix—American Motorists Insurance Company and State Farm Mutual Automobile Insurance Company's Memorandum of Law.

CONCLUSION:

1. The interests of the Plaintiff and WILLIAM BAKER are identical. The Court should therefore realign WILLIAM BAKER as a Plaintiff.

2. WILLIAM BAKER is an indispensable party to the present litigation.

3. The Plaintiff does not have an actual case or controversy with the Defendants AMERICAN MOTORISTS or STATE FARM.

4. The LONGENECKERS are entitled to proceed with uninsured motorist Arbitration immediately.

Respectfully submitted,

JAMES P. BRADLEY, ESQUIRE
Attorney for Defendant
American Motorist
Insurance Company

ROCCO P. IMPERATRICE, III, ESQ.
Attorney for Defendant
State Farm Mutual Automobile
Insurance Company